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Inclusionary Zoning: New Ways Forward

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December 2010**

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Introduction

Inclusionary zoning is currently one of the most promising policies in the field of affordable housing, and one which has been slowly gaining in popularity since the 1970's. Inclusionary zoning works by requiring housing developers to include a certain percentage of affordable housing in their developments. A municipality will write an inclusionary zoning ordinance into its zoning code to specify exactly how much affordable housing developers should create, what income levels it should be available to, how long it should remain affordable, and what kind of compensation developers are given in exchange. The basic idea is to leverage private housing markets to provide for the needs of low- and moderate-income households who either can't afford to live near where they work or who find themselves being forced out of their homes by soaring housing prices. Inclusionary zoning responds to these needs by ensuring affordable housing units are inconspicuously integrated into market-rate developments. This helps to achieve the dual goals of creating affordable housing and reducing economic segregation in the housing market.

Inclusionary zoning came into being as a way to combat the implicitly "exclusionary" zoning codes of many affluent, suburban towns which served to discourage the migration of low-income people away from urban areas. After gradually becoming more popular over the past few decades, it is now found in hundreds of municipalities nationwide. As inclusionary zoning becomes an increasingly popular tool of policymakers, it is essential that past and current experiences with it be examined critically, so as to employ future programs to their full potential.

This paper seeks to analyze the basics of inclusionary zoning and find ways in which it can most effectively be applied to a greater number of cities and towns. Towards this goal, I first give a brief history of inclusionary zoning and describe some of the most well-known examples

of its implementation. I then examine the need for affordable and inclusionary housing, what other policies are currently being used to meet this need, and how inclusionary zoning fits in. Following this, I detail what exactly an inclusionary zoning ordinance entails and look at the legal and economic issues relating to inclusionary zoning. Subsequently, I propose explanations for some of the successes and failures that have been encountered in implementing inclusionary zoning. I then discuss what special considerations might have to be made in adapting inclusionary zoning to different geographical areas. Finally, I review policy recommendations made in the literature, and propose a few recommendations of my own.

Inclusionary Zoning

Inclusionary zoning is one of the most promising policies to increase affordable housing.

The term “inclusionary zoning” refers to any zoning regulations that either mandate or provide incentives for housing developers to include a certain percentage of housing units in their developments that are priced below market-rates. Inclusionary zoning which is incentive-based rather than mandatory is also called “incentivized zoning”, and both terms fall under the category of “inclusionary housing”, which is the general practice of integrating affordable housing into the rest of the general housing stock by any means. (“Inclusionary zoning” and “inclusionary housing” can sometimes be used interchangeably, and I may refer to both as IZ and IH, respectively.) The term “inclusionary zoning” was coined to contrast with “exclusionary zoning”, which is zoning which explicitly or implicitly leads to segregated housing. Housing segregation is manifested in a variety of ways and is now more frequently economic than racial, although much of the economic housing segregation today stems from racial segregation. “Exclusionary zoning” refers to zoning code which perpetuates this segregation by effectively prohibiting low- and moderate-income households from living in areas with predominantly high-income housing. For example, a town’s zoning code may prohibit multifamily housing, or require that houses or housing lots be of a certain minimum size, or that parcels of land have no more than a certain housing density. Zoning code to this effect can essentially bar modest housing or apartments from being built within a town’s limits. Even if the prohibition on low or modest-income housing is unintentional on the part of a municipality’s planners or legislature, what may often be borne in mind is an implicit desire to preserve an exclusionary status quo, and this can be just as insidious. Advocates for mixed and affordable housing have made inroads against exclusionary zoning by making the argument that it is inherently unjust when police officers, fire fighters, or other public workers with modest salaries can’t afford to live in the very

towns in which they serve. Another argument against exclusionary zoning is that it leads to the concentration of low- and modest-income people within cities, separating the tax base needed to support public services from the people that need them. This economic segregation also increases commute times if people cannot afford to live near where they work, contributing to urban sprawl. Economically segregated housing may also be seen as an ethical problem, wherein vestigial de facto racial segregation is perpetuated and a person's quality of life is determined by place of birth. It is against this background that inclusionary zoning came about.

Inclusionary zoning exists in a number of forms, owing to its multipart beginnings. One of the earliest precursors to modern inclusionary zoning was the passage in 1969 of Chapter 40B of the General Laws of Massachusetts, known as the “antisnob” law or simply Chapter 40B. This law to a large degree strips control over housing development away from local governments and places it in developers' hands. Chapter 40B applies to every Massachusetts municipality where less than 10% of housing can be classified as affordable. It confers special privileges on any developer who proposes building a project of which 25% or more of its units are affordable to low- and moderate-income households. If a developer proposes to build such a project at a site which is zoned for the appropriate type of housing but is rejected by the local government, the developer may appeal to a state Housing Appeals Committee. The development proposal can then only be rejected for non-subjective planning objections, such as concerns over health or the preservation of open space (Porter 2004a: 16). This process, also known as the “builder's remedy” is designed to ensure that developments containing affordable housing are not excluded from a community for arbitrary or prejudicial reasons. However, no affordable housing is built if developers don't take the initiative in creating it. In attempts to address this weakness, a subsequent ordinance and executive order inserted stricter requirements into the Massachusetts

law, but its fundamental design remains the same. Other states such as Connecticut and Rhode Island have since passed similar laws, although one evaluation of New England states' builder's remedy laws finds a limited ability to increase the supply of suburban affordable housing (qtd. in Porter 2004a: 32).

Inclusionary zoning is often adopted independently by municipalities. The first inclusionary zoning ordinance was adopted in Fairfax County, Virginia in 1971. However, it was overturned by the Virginia Supreme Court two years later, as the County lacked legal authority to implement such a law. The ordinance was also ruled to be an illegal "taking" under constitutional law for having imposed excessive restrictions on private developers, depriving them of profit without just compensation. Virginia law was eventually revised to allow Fairfax County to again implement an inclusionary zoning ordinance in 1990, this time with incentives and cost offsets provided to housing developers. Much before then, however, other municipalities would adopt inclusionary zoning ordinances of their own. Montgomery County, Maryland- Fairfax County's neighbor across the Potomac- adopted an inclusionary zoning ordinance in 1974, having learned from Fairfax County's mistakes. This ordinance is certainly the most well-known in the literature on inclusionary zoning. It requires that housing developments of a certain minimum size set aside between 12.5 and 15% of their units for households earning below 60% of the Area Median Income (AMI). For-sale, homeownership units must remain at this affordability level for 10 years, and rental units must remain affordable for 20 years (Porter 2004a 11). The local housing agencies of Montgomery County are also given the opportunity to purchase up to 40% of these units when their initial period of affordability expires. This further subsidization makes the units affordable to households with even lower income. These components of the ordinance have contributed to its enormous success; it has directly produced over 11,000 inclusionary units

since its inception (Anderson 2003: 20). Municipalities across the country have adopted and modified Montgomery County's ordinance for their own inclusionary zoning programs, to varying degrees of success.

Finally, many inclusionary zoning ordinances exist as the products of a process in between that of independently adopting an ordinance and having the "builder's remedy" be mandated by a State. Most examples of these ordinances are in New Jersey and California. Localities in New Jersey are required to meet their State-determined "fair share" of the region's affordable housing needs as the result of two State Supreme Court rulings known as *Mount Laurel I* (1975) and *Mount Laurel II* (1983). Every New Jersey municipality must have outlined in the housing element of its master plan how its "fair share" is to be met. The New Jersey Fair Housing Act of 1985 recommends inclusionary zoning as one method for municipalities to meet their legal obligations, and the builder's remedy is imposed as a penalty for noncompliance (Tustian 2000: 23). This approach has created de facto inclusionary housing in about 250 New Jersey municipalities, and the construction of about 29,000 affordable units as of 2001 (Burchell 2000: 4; Porter 2004a: 19). Since the 1970's, California municipalities have been required to plan similarly for affordable housing. The California Department of Housing and Community Development (HCD) can only review these plans, however, and cannot mandate changes beyond stopping the issuance of building permits. And even if a locality does have a satisfactory plan for providing affordable housing, there is little government enforcement for making sure such housing is actually built, although private lawsuits have been occasionally filed against localities to force them to meet their legal obligations (Calavita 1998: 154). HCD's position towards inclusionary zoning has varied over the years along with California's shifting politics and economic conditions. Two constants, however, have been California's Density Bonus Law and

Community Redevelopment Law. The Density Bonus Law, passed in 1979, requires that eligible developments- those with 25% of their units designated as affordable- be awarded a 25% bonus to the maximum development density allowed by a municipality's zoning code. And the Community Redevelopment Law requires that 30% of housing units built by redevelopment agencies be affordable, and 15% of all housing units built in redevelopment areas be affordable. These policies have evidently had an encouraging effect on the adoption of inclusionary zoning in California. As of 2007, 170 out of California's 527 cities and counties had adopted inclusionary housing programs in some form (Calavita 1998: 154; NPH 2007: 3). While this number may seem modest, this is almost a three-fold increase from 1994, with 63 California municipalities having adopted these programs in only the four years prior to 2007 (NPH 2007: 3). It is estimated that about 30,000 affordable units have been produced through these programs (NPH 2007: 11). Other States have housing policies similar to those of New Jersey and Massachusetts. About half of the States require local governments to plan to meet housing needs, and a few specifically mention using inclusionary zoning, but none are as progressive or successful in implementing inclusionary zoning as California and New Jersey have been (Porter 2004a: 7).

Inclusionary housing programs in Massachusetts, Montgomery County, New Jersey and California account for the majority of inclusionary housing produced, but inclusionary zoning is geographically diverse, and more so every year (Porter 2004b: 241). Inclusionary zoning has been adopted in places as widespread as Boulder, Colorado; Burlington, Vermont; Santa Fe, New Mexico; Chapel Hill, North Carolina; Yonkers, New York; and Highland Park, Illinois. And whereas inclusionary zoning programs were previously adopted mostly in suburbs, they are increasingly being applied to large cities such as San Diego, Denver, Boston, and San Francisco.

Advocates are pushing strongly for cities such as Los Angeles and New York City to develop their inclusionary housing programs more fully, as well. Inclusionary zoning has also been adopted by entire counties, like Montgomery and Howard County in Maryland or Fairfax and Loudoun County in Virginia (Porter 2004b: 240). Inclusionary housing is now even found internationally, in countries like Canada, Australia, and India (NPH 2007: 3). Inclusionary zoning is on the rise, and shows great potential as a policy tool, if properly implemented. The task ahead is to find and apply what works best, so that its use may continue to expand.

Existing Remedies for Affordable Housing Needs

The need is pressing for more affordable housing nationwide. A widely-used definition of housing affordability is that a household spend no more than 30% of its budget on total housing expenses. Affordable housing is commonly understood to mean housing which is affordable to households with moderate-, low-, very low-, or extremely low-incomes relative to the Area Median Income (AMI), a measure of average income in the local area. Definitions vary, but moderate-income is usually considered to be 80-120% AMI; low-income is 50-80% AMI; very low-income is 30-50% AMI; and extremely low-income is below 30% AMI (NPH 2007: 8). The Department of Housing and Urban Development (HUD) calculates the AMI's on which municipalities base their housing policy. HUD estimates that 12 million renter and owner households spend more than 50% of their incomes on housing, and that, "The economic expansion of the 1990s obscured certain trends and statistics that point to an increased, not decreased, need for affordable housing" ("Affordable Housing"). Between 1985 and 1999, the

number of rental units affordable to lower-income households declined by 9.5% as rental costs rose faster than inflation-adjusted incomes (qtd. in Porter 2004a: 5). And in 2005, 42 million American households- 100 million Americans- lived in physically deficient or unaffordable housing (qtd. in Schwartz 2010: 1). These housing problems are especially concentrated among low-income households: 91% of renters and 57% of homeowners with severe cost burdens are in the bottom quartile of the income distribution (Schwartz 2010: 29). These affordable housing needs are urgent, but inadequately met by current housing programs. In fact, federal funding for affordable housing has been on the overall decline since the 1970's. Inclusionary zoning expert Douglas Porter observes that "except for the Low-Income Housing Tax Credit program, federal incentives to encourage low- and moderate-income housing starts have largely disappeared" (Porter 2004a: 5).

The affordable housing subsidized by the federal government is done so through a patchwork of programs administered by HUD. Historically, public housing has probably been the most notorious of these programs. The concentration of poverty into isolated environments has been acknowledged as a mistake, and has not surprisingly led to high levels of crime, social apathy, and poor health and education outcomes. A popular perception of public housing as existing in high-rise, semi-abandoned buildings was probably exaggerated. In 1984, only 17% of the nation's 1.3 million public housing units were located in family high-rise buildings (Merriam 1985: 103). Public housing was typically "modest in size", "almost fully occupied", and while there were projects that fit the stereotype, these were "a distinct minority" (qtd. in Merriam 1985: 103). Nevertheless, since the 1970's the federal government has been pursuing other means of providing for affordable housing. These alternative programs are still funded by HUD but allow

states and local governments more discretion in how the funding is spent, within certain guidelines.

One of these alternative programs is the Housing Choice Voucher Program, more commonly known as “Section 8”. Section 8 may be tenant-based or project-based. Under the tenant-based subprogram housing vouchers are distributed directly to people unable to afford average housing. The vouchers guarantee that those people will spend no more than 30% of their income on housing expenses for a residence which is fair-market priced. A holder of this section 8 voucher therefore has access to the general housing stock (assuming the voucher is accepted) instead of being consigned to wherever low-income housing is available. And under the Section 8 project-based subprogram, rents of designated apartments are subsidized for anyone with low enough income to qualify for residence. All residences that house Section 8 tenants must meet federal housing quality standards. There is an appeal to this program for landlords since their rent is guaranteed by the government whether the voucher holder can pay or not. However, there is heavy competition and long waiting lines to become a voucher holder, and some landlords refuse to accept these vouchers for discriminatory reasons, a practice which is often illegal under fair housing laws.

Another federal program is that of the Low-Income Housing Tax Credit (LIHTC). Under this program the federal government gives subsidies to private housing developers who build affordable housing. Development projects eligible for the tax credits must have at least 20% of the units be affordable to households earning 50% or below AMI, or have 40% of the units be affordable to households earning 60% or below AMI. LIHTC’s were responsible for the construction of about 1.3 million affordable housing units between 1980 and 2000, helping finance 90% of all affordable housing built during this period (Rusk 2005: 2). However, this

program still tends to segregate affordable housing since much of its is clustered and is built for the explicit purpose of being affordable, rather than integrated into the general housing stock so that it is mostly indistinguishable from market-rate housing.

The advantage of inclusionary zoning is that it requires neither direct government construction of housing, as with public housing projects, nor federal subsidization, as with Section 8 or LIHTC. Inclusionary zoning takes place at a local level and according to the discretion of local officials, so no external funding is necessary. Inclusionary zoning is also a broad, fairly conceptual policy, whereas government programs, although administered by state and city officials, are necessarily run according to a top-down, established set of rules. Local governments may interpret “inclusionary zoning” to have a variety of meanings. There is considerable flexibility in determining, among other things, what percentage of new housing developments should be affordable (the “set-aside” rate), what income groups “affordable” housing should be available to (income-targeting), and how long affordable units must remain at the same discounted price. Housing developers are also often allowed to depart from the guidelines established for inclusionary zoning programs under exceptional circumstances.

Despite the relative flexibility of inclusionary zoning as a housing policy, developers and others may still oppose its adoption into law, especially when such a policy is mandatory. Housing developers make the economic argument that when forced to price any of their units below the market rate, they must either suffer a loss of profits or raise the price of their remaining units to compensate, increasing housing prices and decreasing the housing supply. The higher housing prices would effectively amount to a tax on housing for general homeowners to subsidize the discounted units, and new housing would be stifled. Proponents of inclusionary zoning respond that developers are often given enough incentives and discounts to offset the

higher costs incurred incorporating affordable housing into their developments, and that numerous studies have found little evidence of any actual link between mandatory inclusionary zoning and the pricing and creation of housing in affected markets. It would seem that inclusionary zoning is least economically disruptive and most effective in creating affordable housing when it is implemented in municipalities with robust housing markets undergoing growth. However, it is true that if inclusionary zoning is implemented in places with weak or stagnant housing markets, little affordable housing will be created, and potentially negative economic effects are more likely to be exacerbated.

Others oppose inclusionary zoning because they feel that it does not address the root issues that lead to housing being unaffordable, such as high land costs, developer fees, growth controls, complicated permitting processes, etc. (CAR 2004: 43; Conine 2004: 36). The solution proposed is for local governments to make it easier for developers to build housing and for the government to build affordable housing itself. Other opponents of IZ argue that private developers should not be required to build affordable housing, because they may not have the skills and experience to build and market the units, as well as ensure their long-term affordability (Werwath 1994: 7). Likewise, some feel that entrusting private development with affordable housing diverts funding from non-profit housing agencies which are more aligned with the interests of low-income households and would be more responsive to their needs (Pyatok 2004: 50). These are valid arguments for debate, but much is dependent on how exactly inclusionary zoning ordinances are designed. The specifics behind inclusionary zoning are therefore taken up next.

Common Components of Inclusionary Zoning Ordinances

There are many elements that must be in place for an inclusionary zoning ordinance to be successful. In crafting an inclusionary zoning ordinance many economic, political, and social factors must be taken into consideration. Ordinances should be sensitive to the particular needs of a municipality, and may vary greatly from each other in regard to their specific provisions. Nevertheless, highlighting how common issues are addressed gives an idea how an ordinance can be designed so as to be both effective and fair.

The following are elements common to most inclusionary zoning ordinances.

Set-Aside Rate: The percentage of units required to be affordable out of the total number of housing units in a new development. A set-aside rate of 15% is most common, but this can vary depending on the income targeting of the ordinance (discussed below) and a host of other factors (Rusk 2005: 2). In California, for example, inclusionary zoning set-aside rates range from 50% in Placer County to 6% in Vista (qtd. in Porter 2004b: 227).

Income Targeting: The income groups for which the affordable units are intended. An inclusionary ordinance may be designed with a certain income group in mind, or may be structured so that multiple income groups are served. Typically moderate and low-income groups are targeted, although Sacramento recently became the first municipality to inclusionary zoning to extremely low-income households (NPH 2007: 31). The income targeting of an ordinance should not be viewed separately from its set-aside rate, since knowing both is necessary to evaluate what kind of an impact will be had on the need for affordable housing. Income targeting may also be set at different levels for rental and for-sale housing. If fewer buyers or renters of a certain income group apply for housing than are provided for in the ordinance, income restrictions are sometimes relaxed to maintain occupancy. However, this

would be uncommon since demand for affordable housing so often exceeds supply that housing agencies must keep waiting lists and hold lotteries to select applicants.

Program Incidence: The housing developments to which an inclusionary zoning ordinance applies. A zoning ordinance may be always be in effect for all residential development, or may only be in effect for certain zoning districts or types of development, or may only become applicable upon certain occasions (Porter 2004b: 221). Inclusionary zoning is also usually applicable only to development projects of a certain minimum size, or “trigger” point. A typical trigger point is when a development contains 10 or more units, but this can vary from 1 unit to upwards of 50.

The developments to which an ordinance applies may be further limited to only certain types of property, such as those zoned for lots of a particular size, redevelopment areas, or city-owned property. In the case where a zoning ordinance specifies that all developments must adhere to inclusionary requirements, but in which a development may have too few units to produce any affordable housing given the mandated set-aside rate (say, if a five-unit development were required to set aside 10% of its units) then developers may be exempted from some of the requirements (discussed in Alternatives to On-Site Construction). Exemptions may also be granted to developments in which including affordable units would constitute a “unique hardship”, or which are judged to meet enough of the affordable housing need without being subject to inclusionary requirements, such as high-rise multifamily buildings.

An ordinance may also seek to integrate affordable units into multiple types of housing, rather than solely new developments. To this end, inclusionary requirements may also be satisfied through the rehabilitation of affordable units, conversion of market units to affordable units, or construction of accessory units (Porter 2004b: 226). Applying inclusionary zoning to the

rehabilitation of existing housing in addition to the construction of new housing is especially important in cities which lack adequate affordable housing and are undergoing gentrification.

Unit Appearance: The size, amenities, and dispersal of affordable units within a housing development. Most inclusionary zoning ordinances allow affordable units to be smaller and have fewer amenities than neighboring market-rate units, within limits. This reduces the costs developers must incur for building units which yield less of a profit. However, both developers and government officials have an interest in ensuring that affordable units are not easily distinguishable from any other units. Developers may be worried about homebuyers or renters who are discomforted by the thought of living next to affordable housing. And government officials will likely be concerned about the social integration of the residents of affordable units, and will at least try to ensure that developers don't build substandard units to meet their inclusionary requirements. One method developers have of disguising affordable housing to look like surrounding housing is to "piggyback" units, wherein two or more for-sale units are designed to look like a single unit from the street (NHC 2000: 31). Methods like these have enabled developers to place together housing units with disparate prices but without any obvious distinction in appearance. For example, one development in Fairfax County, Virginia groups four \$125,000 townhomes next to \$800,000 single-family estates, making them nearly indistinguishable from each other (Brown 2001: 26).

Cost Offsets and Incentives: Local government measures and incentives that partially or wholly compensate developers for the revenue lost on affordable units. This is perhaps the most controversial aspect of an inclusionary ordinance, due in part to the fact that establishing a "fair" level of cost offsets can be so difficult. The need for cost offsets is typically determined by

conducting an economic feasibility analysis, taking into consideration factors such as cost of land, normal developer profit margins, construction costs, and fees. Cost offsets and incentives may be provided as standard practice or negotiated on a case-by-case basis. This ties into the debate over the “economic incidence” of inclusionary zoning and will be taken up later. Below, however, are some examples of what form these cost offsets might take.

- **Density Bonus:** Permission granted to a developer to build more housing units on a site than would otherwise be allowed under a municipality’s zoning code. Density bonuses are the most common cost offset, and “generally allow about a 20% increase in on-site units” (Porter 2004b: 227). The set-aside rate may or may not apply to units added to a development as a result of receiving a density bonus.
- **Design Flexibility:** Permission granted to a developer to build housing to specifications which would not otherwise be allowed under a municipality’s zoning code. Relaxed parking requirements are one example of this. Specifically, a developer may be allowed to provide fewer parking spaces than the zoning code requires (partly under the rationale that tenants of affordable housing generally need less parking space). Denver is one municipality that provides such an offset, with “10 required parking spaces waived for each affordable unit, up to 20% of original parking requirements” (“Inclusionary Zoning” 2003). Other design specifications which might be made more flexible include: setback from the street or property line; floor-to-area ratio; minimum lot size; lot coverage; and road width.
- **Fee Waivers/Reductions/Deferrals:** Waiving, reducing, or allowing delayed payment of impact fees and permit fees typically required of new developments. Longmont,

California, for example, waives up to 14 permitting fees in exchange for the developer's voluntary provision of more affordable units or units of deeper affordability than required. Fee waivers and reductions can represent substantial savings for developers- in the case of Longmont, the average fee is \$3,250 per single-family home and \$2,283 per apartment unit ("Inclusionary Zoning" 2003). Fee deferrals can be just as attractive to developers as fee reductions by lowering the development carrying costs (expenses associated with an investment, such as interest payments on pre-development loans). This could be accomplished by simply allowing the developer to postpone paying fees until the certificate of occupancy is received, rather than upon application for the building permit.

- **Fast-Track Permitting:** Expediting the permitting process so that development can take place at a faster rate. This can also represent substantial savings through the reduction of carrying costs. In Sacramento, inclusionary zoning projects go through a 90-day permitting process rather than a more typical 9-12 month permitting process. The average estimated savings from this are \$250,000 per project ("Inclusionary Zoning" 2003).

Alternatives to On-Site Construction: Allowing housing developers to contribute to the supply of affordable housing without actually including affordable units in their developments. These alternatives commonly take the form of in-lieu fees, off-site units, land dedication, and unit credits. The motivations for developers to choose these alternatives "range from anxieties about the marketing effects of mixing poorer folks with wealthier ones, to reducing development costs for low-income units, to avoiding the design and administrative headaches of building affordable units in a market-rate development" (Porter 2004b: 229). Calavita adds that most housing

developers, "...have little experience building low-income housing and scant motivation to enter an unfamiliar market perceived to entail a high degree of risk" (164).

The use of these will probably result in less of an improvement in the housing stock's inclusiveness, but may have the same effect in improving its overall affordability. Because the affordable units are not being included in market-rate developments but are instead being constructed elsewhere, the degree of housing segregation will remain the same, if not worsen. The production of affordable housing may also be delayed, if the off-site affordable units aren't required to be produced at the same time as the market-rate units. In-lieu fees must accrue over time before financing development with them becomes feasible, finding land for off-site units may be politically risky, and additional administrative time and effort must be spent managing in-lieu fees and off-site units if they are allowed as alternatives to construction (Porter 2004a: 34).

However, these alternatives may also be necessary, or even beneficial, in other ways. A development project may be located on too small a parcel of land or be designed at too high of a density such that a density bonus or other cost offsets would be unusable. In these cases and others where requiring the inclusion of on-site affordable units would present a "unique hardship" for developers and would render the project economically infeasible, the availability of these alternatives provides a way for inclusionary zoning to still be used towards the end of creating affordable housing. By contributing to an affordable housing trust fund in lieu of actually constructing affordable units, a developer may indirectly help finance the creation of affordable housing when a public housing agency or non-profits tap into this fund to pay other affordable housing developers. Whether a lesser, same, or greater number of affordable units is produced from in-lieu fees compared to if the developers had constructed the units themselves

depends on the size of the fees. In-lieu fees are frequently based on measures such as the floor area of the housing development, the number of housing units, or the difference in price between the market-rate units and affordable units multiplied by the number of affordable units that would have been set aside. In-lieu fees should ideally lead to the production of an equivalent or greater number of off-site affordable units so that developers don't simply opt to pay in-lieu fees for being the less costly of the two alternatives. But the fees vary greatly among different municipalities. For example, developers in Pleasanton, California must pay only \$600 for every affordable unit not produced, but \$36,000 per unit in Oceanside, California (qtd. in Porter 2004b: 229). And the inclusionary housing program of Montgomery County, Maryland has allowed the contribution of fees in lieu of development only eleven times in its over 30 year history ("Developing an IZ Ordinance" 6). In-lieu fees may also depend on an ordinance's set-aside rate and income targeting, and may only be permissible for developments below a certain threshold size.

Another alternative developers may opt for is constructing affordable housing off-site. This may be an especially attractive alternative for developers if the location of a planned development is on particularly expensive land. The off-site location is often still in the same jurisdiction, though, and the off-site units may be required to be built simultaneously and in greater number than they would have existed otherwise. The third and fourth alternatives to including on-site affordable units in a market-rate development are land dedication and unit credits. Under the first alternative, the developer dedicates land to be used exclusively for the future construction of affordable housing. Under the second alternative, the developer purchases credits for affordable units from other developers who previously built more affordable units

than were required. However, these two options don't appear to be made as widely available as in-lieu fees and off-site construction.

Resale Controls/Duration of Affordability: How long an inclusionary unit must remain affordable, and what happens to it after its period of affordability has expired. Inclusionary units are usually not required to stay affordable forever. Most are set to remain affordable for 10-30 years although some for-sale units may revert to their market price as soon as the first homebuyer moves out, while others units are set to remain affordable for perpetuity (Porter 2004b: 230). Usually affordable rental units must retain their below-market price for longer than affordable for-sale units, in cases where an inclusionary zoning ordinance treats the two differently. Allowing the affordability of inclusionary units to expire seems counterproductive but serves a legitimate purpose beyond the interests of developers. Buyers of affordable homes will be able to benefit from a higher resale price if the value of the home is allowed to appreciate over time. These homebuyers will also have more of an incentive to provide upkeep and make improvements to their homes. However, many ordinances also have provisions protecting against the total reversion to market prices once a unit's period of affordability has expired. Some municipalities reserve a "right of first refusal" on affordable units, meaning that the municipality, or a housing agency or non-profit organization on its behalf, is given the first chance to resell affordable units as they come on the market. The units are sold either at the same affordable price- preserving the quantity of affordable units- or at a higher, market price- allowing the municipality to recoup some of the costs incurred from running an inclusionary housing program. Even if the right of first refusal is not exercised, usually an ownership agreement is made between the municipality and the homebuyer [or renter] specifying that any "increase in sales price be shared by the owner and the agency administering the program" (Porter 2004b:

231). The municipality's share of the increase in sales price is then deposited back into its affordable housing trust fund.

Supplementary Programs for Greater Affordability: Further subsidizing affordable units to reach income levels below those which a developer is required to target. Greater affordability can be achieved by: mandating that some portion of the inclusionary units be made available to Sec.8 voucher holders; offering homebuyer assistance to purchasers of the units; or, allowing public agencies or non-profits to purchase or rent the units for further subsidization. Mandating that inclusionary units be made available to Sec.8 voucher holders combines local housing policy with federal housing policy, creating savings for the Sec. 8 program, making more units available to potential Sec. 8 tenants, and reducing landlord discrimination since the units can only be designated for affordable housing. Homebuyer assistance is offered in Fairfax County, Virginia, where low interest rate mortgages covering all housing costs are made available to those earning under 70% AMI, resulting in 30% of inclusionary for-sale units in the county being purchased by people with less than 40% AMI ("Inclusionary Zoning"). Another approach is for a local housing authority or non-profit agency to be granted right of first refusal to purchase or rent inclusionary units. The housing authority or non-profit agency may then further subsidize the units' cost to a level of affordability beyond what a municipality is willing to mandate. Montgomery County, Maryland is the most well-known and successful example of this. The Housing Opportunities Commission (HOC) is allowed to rent or purchase up to a third of inclusionary units before anyone else, and HOC-approved non-profits are allowed right of first refusal after this on an additional 7% of inclusionary units ("Inclusionary Zoning"). The HOC purchased 1,722 for-sale units between 1974 and 2005 and annually rents 1,000-1,500 rental

units, making these units available to very low-income households and extremely low-income households who would otherwise not be able to afford them (Rusk 2005: 2).

Preferential Marketing: A stated preference for a certain type of resident. Some ordinances, such as Santa Fe, New Mexico's, express a preference for housing current residents of the city, employees of the local government, and anyone working in the city, often in hierarchical order ("Developing an IZ Ordinance" 10). This can be controversial if exercising such preferences in selecting occupants of affordable housing serves to perpetuate economic or racial segregation.

Inception: The manner in which an inclusionary housing program is first adopted. It should be pointed out that inclusionary zoning ordinances may not always be legislated as ordinances unto themselves, but rather incorporated into broader ordinances or ordinances pertaining to specific types of development (Porter 2004b: 221). Inclusionary requirements may also be separate laws entirely, distinct from the zoning code and administered by a housing department rather than a zoning office, as is the case in Montgomery County, Maryland. An inclusionary housing program may also be initiated by Executive Order, as in Boston, or court ordered. However, no matter how an inclusionary zoning program is started, it is almost always supported by a larger, existing affordable housing program behind the scenes.

General Strength of Requirements: Not all inclusionary zoning programs are strictly mandatory. Programs may be "mandatory, mandatory with incentives, voluntary under prescribed conditions, or voluntary through ad hoc negotiated agreements" (Porter 2004b: 221). Mandatory programs without any compensatory incentives at all are rare, but can be found in places such as Boulder, Colorado and Carlsbad, California. On the other end of the spectrum are

places such as Chicago or New York City with inclusionary programs which consist of little more than protocol for negotiating with developers or a standard package of incentives made available to any developer who voluntarily meets certain affordability criteria. The consensus in the literature is that mandatory programs generally create more affordable housing and for lower-income people than voluntary programs. Studies of the inclusionary programs in Massachusetts and the Washington, D.C. metropolitan area show that a mandatory approach was critical to the programs' success (Brunick 2004a: 3). A similar study of the inclusionary programs in California reaches the same conclusion. The fifteen most productive programs were all mandatory, and two municipalities with less productive programs, "specifically blame the voluntary nature of their programs for stagnant production [of affordable housing] despite a market-rate boom" (Brunick 2004a: 2-3).

One reason for the greater success of mandatory programs is that with non-mandatory programs much greater incentives would have to be offered for developers to voluntarily produce the same amount of affordable housing, or for the same income levels. It is reported that, "Voluntary inclusionary zoning programs that do succeed in generating affordable housing units for a range of low-income households must rely heavily on federal, state, and local subsidies in most cases" (Brunick 2004a: 4). Another reason for the preferability of mandatory programs is the development atmosphere they create, where development of affordable housing is both less stigmatized and more predictable. A housing developer may be reluctant to propose building affordable housing in a community if a community backlash is expected. Richard Dubin, a Maryland developer, says that, "If one developer did it [constructed affordable housing], he would be looked upon as bringing low-income people to your neighborhood" (NHC 2000: 31). Developer David Flanagan echoes Dubin's statement, agreeing that people may resist having

affordable housing nearby, "...but if it is mandated for everyone it is not as important to them" (NHC 2000: 32). Having the program be mandatory would reduce this disincentive. The other positive impact a mandatory program has on the development atmosphere is the greater predictability developers have in planning a project when what they can be expected to give and receive is known in advance rather than negotiated. An article in the Journal of the American Planning Association declares that, "The worst barrier to housing production and constricted supply is an unpredictable development atmosphere...Development decisions are usually fraught with community politics and can be applied unfairly to different developers depending upon their political connections. Under a mandatory inclusionary housing program, developers will always know up front what is required of them" (Brunick 2004a: 4). Indeed, for this reason developers in Irvine, California took the initiative to request that the city council revise Irvine's voluntary inclusionary housing ordinance to be mandatory (Brunick 2004a: 4). In contrast, only one mandatory inclusionary housing program was ever made voluntary, owing to local political reasons and gross mismanagement of the program (Jacobus 2007: 1; Brunick 2004c: 8). Subsequent to the change much fewer affordable units were produced annually (Brunick 2004a: 6).

The current trend is for new inclusionary housing programs to be mandatory, and it is this type of program that this paper primarily addresses. However, it should be mentioned that is theoretically possible for a voluntary program to be just as successful. With enough incentives and cost offsets and a local government especially committed to producing affordable housing, developers may be just as compelled to participate voluntarily as if they were required to do so. One example of a successful voluntary program is in Chapel Hill, North Carolina, where, "The program is so rigorously marketed by town staff and the town council that no new residential

developer...has approached the planning commission without at least a 15 percent affordable housing component or plans to pay a fee in lieu of building affordable units” (Brunick 2004a: 3). Developers in Chapel Hill view the program as being effectively mandatory since development proposals without affordable housing are so much more difficult to be approved (Brunick 2004a: 3). Thus the same results are achieved but with less risk of developers challenging inclusionary requirements in court. But for a voluntary program to work, it is essential that such a program be implemented by a local government with the actual intention of creating affordable housing, and not with the superficial intention of satisfying a State or court mandate. Voluntary programs may be less successful not so much because of their inherent nature, but because the adoption of voluntary standards reflect an underlying apathy towards the goals of such a program. Whether mandatory or not, the involvement of a local government in managing its inclusionary housing program is one of the foremost determinants of its success.

Program Administration: The management and oversight of an inclusionary housing program. This may be the key to the success of an inclusionary zoning ordinance, more than any other single factor. It is wrong to assume inclusionary housing will automatically be created simply by passing an inclusionary zoning ordinance. The administrative requirements of a successful program must include: oversight of production, pricing units to be affordable, marketing to eligible residents and monitoring of units to verify owner occupancy and payment of fees (Jacobus 2007: 3). For-sale units may bear the additional administrative requirements of: educating buyers about ownership requirements, screening eligible buyers, providing additional home financing if necessary, and managing the resale of units (Jacobus 2007: 3). The California Association of Realtors states in a policy briefing paper that resale controls and other mechanisms for ensuring long-term affordability probably create the greatest demand for

program supervision, due to complicated legal and title issues requiring enforcement (CAR 2004: 45). Rick Jacobus, in a PolicyLink article on inclusionary housing administration, writes that, “When these administrative responsibilities come as a surprise, program managers often find it difficult to respond to developer needs and to track and monitor the affordable units that are produced. Failure to provide adequate staffing and systems for ongoing administration can result in loss of affordable units either directly through illegal sales, subletting, or foreclosure or indirectly by undermining public support for the inclusionary housing program” (Jacobus 2007: 1). He cites the examples of Orange County and Santa Barbara County, California, as program administration horror stories. In Orange County, the workload became so overwhelming that the Housing Authority entrusted with the program’s oversight was forced to release units from their affordable restrictions, and many of the remaining deed restrictions were ruled to be unenforceable by a judge (Jacobus 2007: 1-2). And the inclusionary housing program in Santa Barbara was almost shut down after it was revealed that, “...as many as quarter of the county’s 400 inclusionary homebuyers were illegally using their homes for rental income, nine homes had been lost through foreclosure and several owners had taken out mortgages far in excess of their homes’ restricted value (Jacobus 2007: 3). Programs may also fail to adequately track all the affordable units being created. Mukhija et al. in their analysis of inclusionary zoning in Los Angeles and Orange Counties find that most of the cities they surveyed “are not robustly monitoring the affordable housing delivered through their inclusionary programs” (248).

Adequate program administration is clearly essential, but a local government doesn’t have to be solely responsible for performing this task. Jacobus points out that this responsibility can be taken by a competent private contractor, a nonprofit housing agency or shared among several local jurisdictions with a joint administration staff (10-11). The actual costs of

administration are also fairly low. Economies of scale reduce costs for larger programs, and the monitoring of rental units is reported to be much less staff intensive than the monitoring of for-sale units (Jacobus 2007: 12). Jacobus recommends a staff of about one full-time employee for every 140 to 400 for-sale units, or every 600 to 1,000 rental units (12). Montgomery County, Maryland, one of the most successful inclusionary housing programs in the country, is reported to have no more than six full-time employees on its administration staff (Jacobus 2007: 12). Furthermore, a local government can draw on an assortment of revenue sources for funding program administration. The best idea seems to be for the funding to be tied to the size of the program itself, such as through resale, administration, or ground lease fees, so that the program doesn't outgrow the revenue allocated to it under a general budget. In summation, Jacobus writes, "While the cost of properly administering and monitoring inclusionary housing programs can be surprising, there is no reason to see these costs as prohibitive. Relative to the resources being invested in creating inclusionary housing, the cost of monitoring and sustaining that housing is very modest, even for the most intensive programs" (15). To avoid wasting a program's potential, its needs and expenses should be anticipated and planned for well in advance. Investing in inclusionary housing requires a moral and material dedication to its objectives, but if done right, the benefits can far outweigh the costs.

Legal Issues

The legality of inclusionary zoning was first addressed in a series of court cases in the 1970's and 1980's. The most famous and influential court decisions of this time came out of the New Jersey Supreme Court in two decisions known as *Mount Laurel I* (1975) and *Mount Laurel II* (1983). *Mount Laurel I* (South Burlington County NAACP v. Township of Mount Laurel) ruled that New Jersey towns must provide their “fair share” of regional affordable housing and that, “Developing communities must make realistically possible the opportunity for an appropriate variety and choice of housing for all categories of people who wish to live there” (qtd. in Porter 2004a: 18). After local resistance to the decision, *Mount Laurel II* reaffirmed the ruling and added teeth to it by implementing the “builder’s remedy” and other measures. Unfortunately these rulings were later watered down by legislative action, but they stand as prime examples of how affirmatively creating affordable housing can be legally justified, if not legally necessary for providing for the general welfare and eliminating discriminatory policies.

The arguments considered in *Mount Laurel I*, *Mount Laurel II*, and relevant cases concern the issue of government intervention in housing markets through “development exactions” and at what point this intervention unreasonably infringes on private property, given the necessity of righting a wrong or providing for the general welfare. Development exactions are requirements for land dedications, fees, or public services imposed on developers as conditions for receiving building permits. There is a established precedent of municipalities using development exactions for different purposes, the rationale being that they mitigate some kind of negative externality caused by the development, and thus are justified impositions on the developer. For example, since the mid-1980's many central cities have exacted “linkage fees” from developers of commercial and industrial space on the basis that such development inevitably creates a need for workforce housing. These linkage fees are used to finance the

construction of affordable housing or are deposited into an affordable housing trust fund.

However, one of the difficulties of imposing exactions on developers is that exactions are not as legally well-established as common taxes and are only levied on a small subset of the general population. Imposing development exactions on housing developers, in particular, is even less well-established. In the view of the courts, exactions are constitutionally justified on the basis that the authority to impose exactions on private development derives from the power of the States to “promote the general welfare”. But excessive imposition, to the point where an individual is deprived of private property “without just compensation” is said to constitute an illegal “taking”.

Court precedent indicates that for a development exaction to be legal there must be an essential nexus between the need created by a development and the use of its exaction, and that this exaction should be roughly proportional to the need. Specifically, there are two primary judicial “tests” commonly applied to exactions to determine their legality if ever challenged in court. One of these is the uniquely attributable test, which requires that an exaction target only those needs which directly arise out of a specific development. For example, an exaction that requires a suburban housing developer to help pay for new street lamps would meet this requirement. It may be harder to make the same case for affordable housing, since the need for such housing is not directly created by new development nor attributable to any one project. An exception to this might be when affordable or mixed-income housing is replaced with higher-income housing, displacing low-income residents. But in the case of new housing development, the need for affordable housing is more tenuously attributed to the expectation that any new development ultimately leads to the creation of new jobs, some being low-income and requiring appropriate housing.

Another test used by courts in assessing the legality of inclusionary zoning is the proportionality test. This test only requires that an exaction be reasonably proportionate to the needs created by a development project and similar development projects over time. This test takes a more comprehensive, long-term view of development rather than treating every development project as a separate entity. Despite its apparent weakness in meeting the uniquely attributable test, inclusionary zoning is usually held to be legal due to courts taking the broader proportionality test. Developers might raise two other objections in regard to the proportionality of an IZ ordinance. One is that are larger projects are disproportionately burdened if only projects of a certain minimum size are subject to inclusionary requirements. The other objection is that the need for affordable housing is not only created by new development but existing development, as well, and so inclusionary requirements should not be solely applied to new housing. The first objection can be satisfied by requiring developers to pay in-lieu fees if a development is too small to meet the inclusionary threshold, but the second objection is less easily addressed. Thomas Kleven writes that, “One possible answer is that new development is required only to provide for the additional low-cost housing needs it creates. Another is that existing development also contributes to the provision of low-cost housing through rent control, condominium-conversion regulation, housing-code enforcement, or even property taxes” (Merriam 1985: 124). Others, such as Daniel Mandelker, believe that exaction doctrine should not be strictly applied to inclusionary zoning at all. Mandelker writes that “Exaction doctrine developed as a limitation on the authority of local governments to shift to the private sector the cost of facilities that the public sector normally assumes. This problem is not raised by inclusionary zoning...inclusionary zoning merely requires a modification in the economic mix of housing provided by the developer” (Merriam 1985: 35).

In general, as long as an inclusionary ordinance is not grossly disproportionate and a good faith effort seems to have been made to be as fair to developers as possible, courts are likely to defer to the judgment of a municipality or legislature. To this end, provisions will often be written into IZ ordinances explicitly stating the need for affordable housing, and ideally, the municipality will also be able cite the results of a commissioned economic analysis into what contributions developers can reasonably be expected to make and still be profitable.

Although courts have repeatedly ruled in favor of the constitutionality of inclusionary zoning and a solid legal framework provides for its implementation, some developers argue that it is nonetheless wrong to ask the private sector to supply a public good when such a good should be supplied by the government. This may be a valid opinion, but it is an ideological one at that, and does not delegitimize its legal standing in any way. It is particularly fallacious to claim that a municipality does not have the right to exercise its zoning powers for any explicit inclusionary objectives because doing so would demonstrate some socioeconomic agenda. As eloquently stated in the *Mount Laurel II* decision in regard to inclusionary zoning ordinances:

“The contention that generally these devices are beyond the municipal power because they are ‘socio-economic’ is particularly inappropriate. The very basis for the constitutional obligation underlying *Mount Laurel* is a belief, fundamental, that excluding a class of citizens from housing on an economic basis (one that substantially corresponds to a socio-economic basis) distinctly disserves the general welfare... It is nonsense to single out inclusionary zoning (providing a realistic opportunity for the construction of lower income housing) and label it ‘socio-economic’ if that is meant to imply that other aspects of zoning are not. Detached single family residential homes, high-rise multi-family zones of any kind, factory zones, recreational, open space, conservation, and agricultural zones, regional shopping mall zones, indeed practically any significant kind of zoning now used, has a substantial socio-economic motivation” (qtd. in Merriam 1985: 2).

Economic Incidence

Probably the most vociferous objections to inclusionary zoning come from housing developers who claim that the practice of inclusionary zoning places an unjust burden on them to provide affordable housing for the community, when such a task would be better left to the government to provide, or left for the private market to provide on its own. Developers often allege that the forced inclusion of affordable units in housing developments not only makes housing production less economically feasible for developers, but also stifles the housing market as a whole, leading to higher prices and less production, ultimately undercutting the goals inclusionary zoning was designed to promote. Proponents of inclusionary zoning reply that developers are provided with enough cost incentives and discounts by local governments to offset any harm to developers' bottom line, if not make them better off than they would have been otherwise. The debate is a highly empirical one, since ordinance requirements, cost offsets, and housing markets vary greatly from jurisdiction to jurisdiction.

On the whole, empirical evidence indicates that inclusionary zoning does not suppress housing production or lead to higher housing prices. One study in 2004 by the Reason Public Policy Institute claimed to have found evidence that inclusionary zoning programs in the San Francisco Bay Area were responsible for a subsequent decline in housing production. However, this study has since been much maligned in the literature on the topic for not controlling for other factors which may have affected housing production or including any communities in the study without inclusionary zoning for the sake of comparison. More rigorous analyses now find very little evidence for inclusionary zoning to have a dampening effect on the housing market, and in some cases find that it may even stimulate production. For example, a study of 28 California cities over 20 years, controlling for variables such as

unemployment rate, mortgage rate, and median housing price, showed that inclusionary zoning did not stifle overall housing production, and that housing production actually increased in cities such as San Diego, Irvine, and Sacramento after inclusionary housing programs were adopted. (Brunick 2004c: 7). In a recent study, Mukhija et al. (2010) analyzed the effects of inclusionary zoning on housing production in Los Angeles and Orange County and similarly found no statistically significant correlation between adoption of mandatory inclusionary zoning and housing supply (1). The Southern California Association of Non-Profit Housing researched the productivity of inclusionary housing in seven Southern California cities, speaking directly to city planners and local developers, analyzing the cities' zoning codes and examining a number of economic and demographic factors, and also found no effect of inclusionary housing on overall housing construction (SCANPH 2005: 3). And a 2003 study by the California Coalition for Rural Housing and the Non-Profit Housing Association of Northern California, in perhaps the broadest study of California inclusionary housing programs, finds no evidence that inclusionary zoning is slowing development, regardless of the income-targeting undertaken (qtd. in Brunick 2003b: 10-11). Two older, similar studies produced the same results (qtd. in Brunick 2003b:11). One study finds that inclusionary zoning programs in California did have an impact on housing markets, but only to produce a marginal shift from single family to multifamily housing production (Knaap 2008: 1).

California provides fertile grounds for research on the subject due to the number and variety of inclusionary housing programs in the State. But several other studies have been performed for the Washington D.C. metropolitan area and other places around the country, all corroborating the conclusions of the California studies (Brunick 2003b: 11). A Center for

Housing Policy report fails to find any municipality where inclusionary zoning has led to a decrease in development (qtd. in Brunick 2003b: 12). And a policy brief on inclusionary zoning prepared by Business and Professional People for the Public Interest reports that city officials in a diverse range of cities, “all claim that they have not seen a decrease in development activity in their communities since they implemented inclusionary housing programs,” and in addition, “studies, analytical reports, and community and developer reaction to inclusionary housing programs nationwide indicate that mandatory inclusionary zoning programs in a wide variety of locations are not stifling development”(Brunick 2004c: 7). Less research appears to have directly explored the relationship between inclusionary zoning and housing prices, but at least two studies have reached similar conclusions as the studies on housing production. One study by the Innovative Housing Institute of the inclusionary zoning programs in Montgomery County, MA and Fairfax County, VA found no difference in price trends between market-rate units located adjacent to or near inclusionary units and those located further away (qtd. in Fischer 2001: 2; Center for Housing Policy 2000: 34-35). Another study by the Family Housing Fund of Minneapolis found no difference in sales of market-rate housing following the construction of nearby affordable housing (qtd. in Fischer 2001: 2). A 2008 study by the National Center for Smart Growth Research and Education did find a small effect of inclusionary zoning on housing prices in California: “housing prices in cities that adopted inclusionary zoning increased about 2-3 percent faster than cities that did not adopt such policies,” and, “housing price effects were greater in higher priced housing markets than lower priced markets” (Knaap 2008: 1).

However, these studies should not be interpreted to imply that inclusionary zoning never has a negative effect on housing prices or production, only that it does not necessarily have such an effect. Robert Ellickson (1981) argued that the impact of inclusionary zoning on a local housing market would depend on the market's desirability. His argument makes intuitive sense. In a highly desirable housing market potential renters and homeowners will be willing to be more flexible in the prices they pay, so housing developers are better able to pass on the cost of building affordable units by charging more for their other units. This effectively creates a tax on all housing development to subsidize the creation of affordable housing. Conversely, in a housing market which is stagnant and not especially desirable, housing developers will find it harder to pass on the cost of building affordable units since consumers are not as inclined to pay more than they have to. Consumers would be just as willing to find somewhere else to live, so developers have less control over the prices they set. In a market such as this, inclusionary zoning could plausibly depress production if developers must develop elsewhere. Few, if any, developers would willingly operate in a restrictive market if there was more of a profit to be made elsewhere.

Whether housing developers have big or small profit margins is largely irrelevant in deciding whether to build inclusionary housing in a restrictive market. If their profit margins are small and housing prices are inflexible then they may be simply unable to absorb the higher costs and will choose to build elsewhere. Even if their profit margins are large, they will have little incentive to construct housing under conditions where their profits are any less than maximal. In making these observations I don't mean to demonize housing developers. Many development firms are small operations with moderate wages. If a development firm doesn't aim to maximize profits and minimize costs to its full capacity,

competing firms may gain the competitive edge, putting all the employees of such a firm out of work. A development firm may also have to achieve a certain profit for investors to provide necessary financing. Thus, resistance to building inclusionary housing may be based on considerations of economic survival and employee welfare rather than avarice and indifference towards the needs of those with low and moderate incomes. Therefore, goodwill negotiations between developers and city officials are essential in crafting inclusionary zoning ordinances and determining on a case-by-case basis the extent of concessions each side is prepared to make.

Much of the analysis concerning how developers must contend with the costs of providing affordable housing may be moot, however. Developers almost always receive a set of cost offsets such that building inclusionary housing is approximately cost neutral. Studies of San Diego, Washington D.C., New Jersey, and Salinas, CA have indicated that cost offsets and strong housing markets are sufficient to compensate developers for any profits lost through inclusionary housing (Brunick 2003b: 12). Moreover, researchers have more recently criticized Ellickson's study for overstating the price effects of inclusionary zoning, instead arguing that housing market prices are unlikely to be totally inflexible, and that the implementing inclusionary zoning would rarely be counterproductive in regard to creating affordable housing. And as for any costs developers might bear for providing affordable housing which are not offset by the local government, it is claimed that these costs are further passed on to the original landowners on whose land the housing is built. (qtd. in Calavita 1998: 152) If a landowner owns a parcel of land in a municipality with inclusionary zoning, all future housing developments proposed for that site will be subject to the same inclusionary requirements, so the landowner will have no choice but to accept a discounted

purchase price on all offers made by developers for the land. Since every housing developer knows that every other developer will face the same additional costs, a developer could offer less for the land without concern of being underbid. Calavita and Grimes claim that there seems to be a consensus in the literature that in the long-run, most of the costs imposed on developers are indeed passed backwards to landowners (Calavita 1998: 152). If this is true, in the long-run the effects of any incentives and cost offsets offered to developers would only be to sustain increases in the value of land held by landowners (qtd. in Calavita 1998: 152). These long-term outcomes remain to be empirically shown. But for now it appears that inclusionary zoning requirements imposed on developers do not have a significant effect on their profitability or on the general housing supply.

Evaluation of Success

There is much consideration that must go into crafting a successful inclusionary zoning ordinance. But first, the meaning of “successful” in this context must be defined. The most straightforward way to measure success is to simply look at the number of affordable units created as a result of implementing an ordinance. At the local level this only entails counting the number of affordable units integrated into market-rate housing, whether the housing is a new rental unit, for-sale unit, or the product of the rehabilitation of an existing structure. At the state or national level, however, totaling the number of affordable units created from inclusionary housing policies becomes more difficult. One reason is that there is no formalized record of inclusionary housing beyond the local level, unlike records on total rental or for-sale units collected by the U.S. Decennial Census, so the units must be tallied up city- by-city. In addition, inclusionary zoning ordinances differ greatly from one another, so the inclusionary units

generated in one municipality may not be comparable to those in another. For example, one town may have twice as many affordable units as another, but they may only be required to stay affordable for half as long, or may tend to be made available to people with relatively higher incomes. Furthermore, zoning ordinances are likely to change over time- often the developer incentives are altered or the ordinance is made mandatory after being voluntary- so all the inclusionary housing created over a period of time can't be chalked up to the same policy. These complications render difficult any comparisons between the outcomes of more than a limited number of zoning ordinances over time, and so it is impossible to objectively state that one type of a zoning ordinance is always more effective at creating inclusionary housing than another. Absolute numbers of affordable units created should also not be compared, but should be evaluated in regard to the municipality's and region's need for affordable housing, as well as the degree of housing segregation in need of amelioration.

The amount of inclusionary housing created through a specific ordinance must also be seen in light of broader changes in the housing market. Evidence of the effectiveness of inclusionary housing policy suggests that more affordable housing is created, and less distortion occurs in the housing market's prices and production of housing, when the housing market to which the ordinance applies is robust and undergoing growth. If less inclusionary housing is created under one ordinance than another, it may not be necessarily due to any defect of the ordinance itself, but may rather reflect the presence of a weaker housing market. Differentiating the effects of housing markets and the implementation of inclusionary zoning in various municipalities on the creation of affordable housing is a challenge in which much progress has yet to be made.

The gross number of inclusionary units- as defined as the number of affordable units integrated into market-rate housing- may also be an incomplete measure of the effectiveness of an inclusionary housing policy, since affordable housing may still be created indirectly through an inclusionary zoning ordinance, even if not integrated into other housing as might be ideal. Developers are often allowed to contribute in-lieu fees to an affordable housing fund, construct off-site affordable housing, or make a land donation to a municipality instead of actually incorporating affordable units into their developments. While this defeats the purpose of integrating the housing stock and reducing economic segregation, there are also benefits to allowing developers to make use of these alternatives. Affordable housing is still being created when off-site units are constructed by private developers, in-lieu fees are used to finance the construction of affordable housing by non-profit agencies or housing authorities, or donated land is used for affordable housing when other developable land is scarce. The relevant question is whether the benefits of these alternatives are equal to or greater than those of integrated housing, given the circumstances of a municipality's need for affordable housing. If the in-lieu fees are inadequate to cover the costs of construction of an equivalent number of affordable units as would otherwise have been created or if the affordable housing fund from which construction is financed is mismanaged or used for other expenditures, then the availability of these alternatives to developers may be counter-productive. If, however, in exchange for not including a certain percentage of affordable housing in their developments housing developers must build a greater number of affordable units off-site, contribute more than sufficient in-lieu fees to a housing fund to cover the cost of constructing the same number of units, or donate land which is valued highly enough and is to be designated only for the construction of affordable housing, than these alternatives may in fact have a net positive result.

Housing developers may opt for alternatives in which they indirectly finance the construction of more affordable units than they would have had to build themselves if incorporating affordable units into their developments presents a “unique hardship”- e.g., if developers are unable to take advantage of incentives which would normally reward the creation of mixed-income housing, such as density bonuses or relaxed zoning restrictions. How the attractiveness of these different options to developers and their effectiveness in ultimately creating affordable housing stack up against each other depends on the design of the inclusionary zoning ordinance, as well as the relations between developers and the municipality and the nature of the affordable housing need. In some cases, it may even be desirable for affordable housing not to be integrated with market-rate housing if the development is too isolated from employment, public transportation routes, or other social services such that the lower-income residents become economically stranded in a suburban enclave. Other low-income socially-cohesive groups, such as those pertaining to a specific ethnic minority, may also wish to preserve their traditional lifestyle rather than become part of an unfamiliar community which is often intolerant of certain cultural practices, as articulated by affordable housing architect Michael Pyatok (50). Nevertheless, an inclusionary zoning ordinance can still help finance the creation of non-integrated affordable housing if the affected residents choose to implement it in such a way.

The nationwide adoption of inclusionary zoning has been modest. Roughly estimated, about 350 to 400 suburban jurisdictions have adopted an inclusionary policy, plus an unknown number of jurisdictions that practice inclusionary zoning but have no formalized policy (Porter 2004b: 241) About 170 of these jurisdictions are in California alone (NPH 2007: 3). And there are only a few states in which inclusionary zoning is promoted as a statewide policy. The number of

jurisdictions that have adopted IZ ordinances may be relatively small compared to the total number of jurisdictions in the country, especially considering the number of those jurisdictions in which some policy of inclusionary housing is sorely needed. But the pace at which inclusionary zoning is expanding gives hope that these numbers will not remain small for long. California, for example, has recently undergone an extraordinarily rapid expansion of inclusionary zoning compared to earlier years (NPH 2007: 3). And in all of inclusionary zoning's history there are only two instances in which it has been repealed- in Fairfax County, Virginia for legal reasons (it was later restored), and Prince George's County, Maryland, in which it was felt to have achieved its objectives (Brunick 2003b: 9). Furthermore, it should be remembered that inclusionary zoning ordinances have not been employed as public policy tools for especially long. Given the relatively recent and previously slow-paced adoption of inclusionary zoning, perhaps these figures should not be unexpected.

The number of affordable units produced through inclusionary zoning so far has also been modest. About 65,000 units have been produced in states that mandate towns to make some provision for affordable housing- about 34,000 of these in California and 29,000 in New Jersey (Porter 2004b: 239). An additional 15,000 to 25,000 affordable units have been produced in jurisdictions that adopted a policy of inclusionary zoning by their own volition, and 11,000 of these were in Montgomery County alone (Porter 2004b: 238). But the need for affordable housing is significantly greater. In Massachusetts, for example, about 100,000 low-income families are on waiting lists for affordable housing. From 1990 to 1997, 20,340 subsidized units were produced in Massachusetts, but only 1,200 of these through inclusionary zoning (Porter 2004b: 242) But again, the relatively recent and limited adoption of inclusionary zoning is partly to blame for such a lack of success. Some researchers have attempted to estimate how much

affordable housing could have potentially been created if inclusionary zoning were implemented earlier in certain places. It is estimated that if inclusionary zoning programs had been in place in the six county Chicago region from 1974 to 1999, 136,000 inclusionary units could have conceivably been created (Fischer 2001: 5). Mukhija et al. estimate that if Los Angeles had a 15% set-aside rate from 1980-2001, 28,500 inclusionary units could have been created (qtd. in Mukhija et al. 2010: 250). And David Rusk estimates that if inclusionary zoning were in place in the nation's 100 largest metropolitan areas, 2.6 million inclusionary units could have been created, twice the number of affordable units created through Low Income Housing Tax Credits over the same period and enough to meet about 40% of the affordable housing need (Rusk 2005: 2).

However, even the main prospect of inclusionary zoning- integrating housing of various income levels- has not been realized satisfactorily in many places. An ordinance's income targeting provision may favor those of average or moderate income over those of low income, the eligibility guidelines may be too restrictive, or there may simply be so many loopholes for developers that any affordable housing which is produced is segregated from the general housing stock. In New Jersey, for example, intense local resistance to the *Mount Laurel* court decisions prompted the passage of a law allowing, among other things, for municipalities to export up to half of their affordable housing quota to other towns. This only increases segregation by allowing wealthier suburban towns to buy out of their social burden and instead shift it to those poorer towns in which affordable housing is already available in excess. The authors of one analysis of New Jersey inclusionary zoning policy found that it "has not enabled previously urban residents to move to suburban municipalities and has not enabled Blacks and Latinos to move from heavily minority areas to the suburbs"(Porter 2004b: 245). Neither has Massachusetts

inclusionary policy delivered on its promise of greater housing heterogeneity among cities and suburbs and low and high income groups. After examining the success of the Massachusetts inclusionary zoning statute 40B in overcoming exclusionary zoning, Krefetz states that the statute, “has not, for the most part, resulted in any significant ‘opening up’ of the suburbs to lower income, central city, minority populations” (qtd. in Porter 2004b: 245). Douglas Porter, however, does see evidence of increased economic integration as a overall result of inclusionary zoning, even if efforts towards racial integration and the integration of suburban and formerly urban residents have fallen short of expectations (Porter 2004a: 29). There is also evidence that newer inclusionary zoning programs are more inclusionary and reach lower income levels than earlier programs. In California, 47% of inclusionary units created through new programs are affordable to very low-income households, compared to 20% for older programs (NPH 2007: 20). And 82% of inclusionary units created through newer programs were built on-site, compared to 47% for older programs (NPH 2007: 21).

The success of inclusionary zoning depends upon its ability to leverage strong housing markets for the production of affordable housing. The recent dramatic downturn in the national housing market has devastated many, and does nothing to improve the affordable housing crisis. It would be unfortunate if inclusionary zoning were temporarily rendered useless by this turn of events. Luckily, this is not the case. It has been found that inclusionary zoning can actually help economically sustain developers during recessions and downturns in housing markets. A report by Business and Professional People for the Public Interest states that “developers sometimes find that the affordable homes and apartments that they are required to build are a benefit to them because of the consistently high demand for such units” (Brunick 2003b: 16). Developers in Montgomery County, Maryland, for example, consider the affordable units developed through its

inclusionary zoning program to be valuable, because “they always sell-out or rent-up quickly and help to sustain developers during slower economic times” (Brunick 2003b: 16). Porter corroborates this account. He asserts that “Montgomery County officials report that when high-priced housing demands sag, many developers evince greater interest in building lower-cost units to keep their companies engaged in the marketplace” (Porter 2004a: 31). Present conditions are therefore not unfavorable to inclusionary zoning, but rather exceptionally beneficial to its expansion. Taking advantage of this opportunity would ensure that inclusionary zoning is in place when housing markets become productive again, creating better leverage for affordable housing in the future.

Overall, given the relatively recent implementation of many inclusionary zoning ordinances, the availability of alternatives to the primary objective of inclusionary zoning, and widespread developer and political opposition, the directly attributable benefits of inclusionary zoning have been modest. Both compared to other affordable housing programs and the greater affordable housing need, inclusionary zoning has been responsible for filling only a small part of the affordability gap. However, there is much potential for expansion of inclusionary zoning throughout the country, and even if the absolute amount of affordable housing produced is less than sufficient, inclusionary zoning can still accomplish the goal of diversifying the nation’s housing stock in ways other housing programs can’t. Inclusionary zoning is one part of what will have to be a multipronged approach to addressing the nation’s housing crisis, and progress is still being made in implementing this tool to its full potential.

Expanding Inclusionary Zoning to Large Cities: Challenges and Opportunities

Inclusionary zoning has traditionally been found mostly in the suburbs of metropolitan areas. However, it is increasingly being applied to central cities, including several of the largest. Since 2000, five major cities with populations over 500,000 people have adopted inclusionary zoning ordinances (Brunick 2004b: 3). These cities are: Boston, Denver, San Francisco, San Diego and Sacramento. San Diego is the largest in population out of these and the only city in the country with both a comprehensive inclusionary zoning program and a population of over one million people. Although it is disappointing that more major cities have not adopted inclusionary zoning, this still represents substantial progress, as it is only recently that any large U.S. city has implemented any inclusionary housing program at all. Furthermore, inclusionary zoning may be applicable to some cities more than others, depending on the local housing market and the existing supply and distribution of affordable housing. Some cities, such as Los Angeles, may also have patchwork inclusionary zoning programs, where mandatory inclusionary requirements apply only to designated redevelopment areas or development projects built with city financing. Other cities, like New York City, have inclusionary zoning programs in where incentives (often density bonuses) are offered for developments built in designated areas which include over a certain percentage of affordable units. And the city of Chicago negotiates with developers during rezoning procedures to voluntarily provide affordable housing without having any formal inclusionary housing program (Porter 2004a: 12).

However, it should definitely not be assumed that just because a city has a greater share of affordable housing than its suburbs, that affordable and inclusionary housing is not still a pressing issue. There is a severe lack of affordable housing in many cities which multiple programs will be needed to remedy. Even in cities with adequate housing, housing costs often

consume a disproportionate share of poorer residents' incomes. Perhaps just as important is the distribution of affordable housing that does exist. Such housing may be located on the peripheries of cities, away from the greatest concentration of jobs, or may be undesirably clustered. The social consequences of concentrated and segregated affordable housing are likely to be exacerbated in the city. Increasingly prevalent housing patterns may also imply a greater need for inclusionary zoning now than in the past. The trend of greatest concern is gentrification, where a run-down neighborhood is rehabilitated at the expense of displacing its low and moderate income former residents. The housing needs of low and moderate income people can't be fairly addressed simply by seeking to relocate them to the suburbs; housing should be available to all segments of a population wherever they choose to live.

The implementation of inclusionary zoning in the five cities mentioned above has been promising. The cases of Boston, San Diego and Denver are worth examining more closely. Boston's current inclusionary housing program was initiated by the executive order of Mayor Thomas Menino in 2000 when it became clear that its existing inclusionary housing program was failing to meet its goals. Soaring housing prices were displacing moderate income residents downtown and in surrounding neighborhoods while high-profile housing developments were being built without any affordable units (Brunick 2004b: 3). To address this, the current inclusionary housing program requires a 10% affordable unit set-aside rate for all housing developments with ten or more units which are financed or developed on land owned by the City of Boston or the Boston Redevelopment Authority, or which require some form of zoning relief (Brunick 2004b: 3). This effectively amounts to all housing developments of this size. In-lieu fees are allowed, as are off-site units, but the set-aside rate must be 15%. As of 2004, over 200 affordable units had been created as a direct result of the program, with more units in

development and \$4 million collected in fees (Brunick 2004b: 3). The high ratio of fees collected to affordable units built is not unintentional. Affordable housing advocates were more concerned about the quantity rather than the distribution of affordable units, and therefore lobbied for the inclusion of in-lieu fees and off-site units as attractive alternatives to making the units truly inclusionary (Brunick 2003a: 5). The ordinance is reported to be an overall success, with housing development unaffected and the city now considering raising its overall set-aside rate to 15%.

Denver's inclusionary zoning ordinance was passed by the city council in 2002, and unlike most inclusionary housing programs, covers not only new construction but rehabilitation of existing housing, as well (Brunick 2004b: 3). Denver is also exceptional in terms of the quantity of affordable units produced: 3,395 between 2002 and 2004 (Brunick 2004b: 4). The income-targeting of this ordinance is also fairly deep, requiring that inclusionary rental units be affordable to those earning 65% AMI and for-sale units be affordable to those earning 80% AMI. (Inclusionary rental units can only be provided voluntarily, however, due to a prohibition on rent control.) Perhaps the success of Denver's program can be attributed to the generosity of incentives. The program, not uncommonly, allows for in-lieu fees, off-site units, and flexible parking standards and provides for density bonuses and fast-track permitting. But surprisingly, the program also offers cash subsidies of \$5,000 for every unit affordable to households below 80% AMI, and \$10,000 for every unit affordable to households below 60% AMI (Brunick 2004b: 4; Porter 2004b 228). Moreover, it has had no noticeable negative effect on city development (Brunick 2004b: 4). Yet despite the inclusionary program's apparent favorability to developers, enforcement of its standards is strict. A survey of large cities with inclusionary zoning reports that, "If the developer violates the ordinance in any way, including not

constructing the required affordable units, the city may deny, suspend, or revoke any and all building and occupancy permits”(Brunick 2003a: 7).

San Diego’s inclusionary housing program has been in place since 2003, and represents the expansion of an earlier inclusionary housing program which was only limited to a certain developing area in the city. The program is not especially unique, except that housing developers are offered no incentives or cost offsets whatsoever, an economic analysis having shown them to be unnecessary for developers to still be profitable under the new requirements. And developers, after strongly opposing the ordinance at first, eventually ended up supporting it after working with the city’s Housing Commission to draft some of its provisions (Brunick 2003a: 9).

These case studies demonstrate how inclusionary zoning programs can be crafted to suit a variety of needs in large, central cities. Boston, Denver, and San Diego all tailored their programs in unique ways. Boston’s program is applicable to most new development, places a stronger emphasis on the quantity rather than dispersal of affordable units, and offers little in the way of incentives except for density bonuses in select instances. Denver’s program applies to all types of housing creation and has a strong emphasis on developer incentives and making the inclusionary units as affordable as possible, but exercises strict enforcement of the program guidelines. And San Diego offers no development incentives at all, but nonetheless is unopposed by developers owing to the positive implementation of a previous inclusionary program at a smaller scale and by including developers in the political process of its adoption. This kind of adaptability is essential to making inclusionary zoning in cities as successful as possible, especially considering the unique challenges cities face in this regard. As Douglas Porter writes, “City inclusionary programs raise two issues that have not been fully explored in the literature or by experience in suburban jurisdictions. One is the question of how to stimulate creation of new

units when developable land is scarce; the other is how to promote production of new units without undue displacement of existing residents” (Porter 2004a: 31). In regard to a lack of developable land, some cities may face this issue less than others. Denver, for example, has an extensive supply of developable land downtown and other cities may have tracts of land which are abandoned or underdeveloped (Porter 2004a: 31). For other cities, however, a large fraction of housing development is rehabilitation of existing housing- which raises the issue of displacement of existing residents- or the construction of high-rent apartment buildings in places where land is at a premium. Rehabilitation of old or run-down housing can benefit some, but can also displace low-income residents who can only occupy the most affordable housing available. Applying inclusionary zoning to rehabilitated units may seem like the intuitive answer, but rehabilitation poses special obstacles that the construction of new housing does not. For one, often less units are rehabilitated and at a slower pace than would be the case if the units were part of a new development, meaning that rehabilitation projects may not meet the typical threshold for inclusionary zoning to apply. Also, rehabilitation projects don’t enjoy the same economies of scale in production as new development projects, meaning increased costs per unit for the developer (Porter 2004b: 229). Consequently, as Porter writes, “It appears that only a few of the [inclusionary] ordinances require affordable units in rehabilitation of existing housing or allow credit toward new unit requirements for rehabilitating units or converting nonresidential units” (Porter 2004a: 13).

Inclusionary zoning also must adapt to the unique challenge posed by cities in which a large portion of new housing development is the construction of high-rent, high-rise apartment buildings. As with rehabilitation projects, high-rise developments carry higher costs per unit, and so mandating the inclusion of affordable units is likely to be more strongly opposed by

developers. It is also more difficult to offer incentives to mitigate these costs since density bonuses- the most frequently used incentives- wouldn't be very beneficial to a development which is already planned to have as much density or nearly as much density as possible. High rise developments are also composed of rental units, posing the additional problem of rent control. Some cities, such as Denver, prohibit government interference in setting rent levels, so if any units are set at below-market rents for a certain duration of time, it must be done so voluntarily. This issue arose recently in Los Angeles, when a newly passed inclusionary zoning ordinance applying only to redevelopment areas was challenged in court by a developer who claimed that the price restrictions on rental units contradicted an earlier law banning any form of rent control. Although this should not have invalidated the entire ordinance, many California cities and towns now must reevaluate the legality of their ordinances to ensure that their programs are not similarly threatened by developer litigation.

Another potential legal issue is passing the same “specifically attributable” and “proportionality” tests that development exactions must pass in the suburbs. As Thomas Kleven writes in “Inclusionary Zoning Moves Downtown”, “At least one court which has been willing to accept exactions on new development in growing communities has suggested that it might be a different matter in fully developed communities. The court apparently felt the threats of lack of causal attribution and disproportionality to be greater in the urban context” (Merriam 1985: 117). He argues that it may be harder to demonstrate a need for low-cost housing if no net population growth is occurring and redevelopment is perceived solely as a positive economic activity. He also cautions that it might seem disproportionate to place the costs of affordable housing only on new development and redevelopment and not existing development, as well. The economic and legal issues surrounding new development and redevelopment in cities should be taken seriously,

since jeopardizing possible economic activity in a struggling city may be the least desirable outcome of all. But Kleven replies that a city should still be able to make a legitimate case for inclusionary zoning “where it can show that redevelopment, either on an individual project basis or as an overall process, displaces low-income people, or reduces the low-cost housing stock, or increases housing prices by stimulating gentrification” (qtd. in Merriam 1985: 123-124).

Implementing inclusionary zoning in cities presents unique challenges, but also presents unique opportunities. One such opportunity is the possibility of reducing urban sprawl. A lack of affordable housing in central cities compels low and moderate income people to move to the suburbs, if more affordable housing is to be found there. Douglas Porter documents the clustering of inclusionary housing programs around certain metropolitan areas. For example, Washington DC, which has been slow to implement inclusionary zoning, is surrounded by Montgomery, Howard, and Frederick Counties in Maryland and Fairfax, Arlington, and Loudoun Counties in Northern Virginia, all of which have active inclusionary zoning programs (Porter 2004a: 21). Similar clusters also exist around San Francisco, Los Angeles, San Diego, Denver and Boston (Porter 2004a: 21). If housing opportunities can be found around central cities but not in the cities themselves, this may exacerbate trends of urban sprawl. Indeed, while higher-income households relocate back to urban centers, evidence suggests that low and moderate-income households are simultaneously relocating to inner-ring suburbs. For example, an article in the journal of the American Planning Association reports that, “Census data for 2003 show that cities such as Chicago, which saw population gains from 1990 to 2000, have again begun losing population to suburbs with better housing options for working-class households” (Brunick 2004b: 6). This does not necessarily mean that there is no affordable housing crisis in the suburbs- only that in some cases rents and housing prices are marginally better than what can be

found in the city. This also says nothing about the distribution of affordable housing. Ideally, a city and its suburbs should both have a balanced amount of affordable housing which accommodates the mix of income levels of those that choose to work and reside in either place. The location of affordable housing should not distort the decisions people make as to where to live, nor should its residents have to commute farther to their workplaces for lack of closer housing of equal quality. Inclusionary zoning should be implemented in cities experiencing sprawl as urban residents are priced out of their homes, just as inclusionary zoning should be implemented in suburbs where low and moderate income earners are unable to live in the very towns in which they work. As stated in the report “Large Cities and Inclusionary Zoning”, “Through an inclusionary zoning program, large cities can use density bonuses and other cost offsets to produce a stock of affordable housing within the city core, thereby helping to reduce the pressure to continually sprawl outward in order to produce affordable housing on the fringe” (Brunick 2004b: 2). As another unique advantage of inclusionary zoning in cities, these cost offsets would not even have to be substantial. As the same report goes on to state, city staff interviewed in the cities of Denver, Boston, San Francisco, San Diego, and Sacramento indicate that, “cost offsets were not necessary because the strength of the local housing market and the ongoing demand from people to live and build housing in those cities allowed developers to build the “set-aside” units and still make their project work economically” (Brunick 2004b: 3). In support of this point, Porter argues that to apply inclusionary zoning to especially cost-intensive developments in large cities, cost offsets wouldn’t have to be as large as previously assumed. For example, “inclusionary zoning requirements can work in high-rise building if developers view inclusionary projects as a whole rather than insist on analyzing comparative costs of market-rate units...Affordable units can be downsized and equipped less lavishly than market-rate units. The

building can be designed to group them efficiently in sections of floors. A modest density (building height) increase can be offered to provide added space for them”, etc. (Porter 2004a: 34). Urban environments are often conducive to discovering innovative design solutions, and it would be in the interest of many cities to find ways to make inclusionary zoning work rather than assuming that no more can or should be done to address the affordable housing issue. As Paul Davidoff, one of the original proponents of inclusionary zoning wrote, “Too often, the revitalization of city neighborhoods fails to benefit existing residents and frequently leads to their displacement...Rather than including them by offering decent education, employment, and housing, the poor have been treated as an obstacle to revitalization. It is only when we begin to act inclusionarily that our cities will have a chance to grow decently and equitably” (Merriam 1985: 4-5).

One final advantage of adopting inclusionary zoning in cities lies in the fact that cities can serve as visible pioneers of policy. If large cities across the county demonstrate successful implementation of inclusionary zoning, it could result in smaller cities and towns following their lead, fueling a faster proliferation of inclusionary zoning than if isolated suburbs adopt it independently, as is being done now. As David Rusk notes, “Neighbors do follow the leader”. As evidence, he cites the fact that 34 municipalities were the first in their counties to adopt inclusionary zoning. These municipalities averaged 17 percent of their county’s population when inclusionary zoning was first adopted, but surrounding towns subsequently followed suit, such that such that 52 percent of those counties’ populations are now subject to inclusionary zoning, as well (Rusk 2005: 5). An analysis of the effects of inclusionary zoning on the housing markets of San Francisco, Washington D.C., and suburban Boston also revealed that, “The probability of having IZ increases with the share of other jurisdictions in the county who have IZ, even

controlling for other characteristics”(Been 2007: 76). Strategic adoption of inclusionary zoning in metropolitan areas could have an enormous influence on the spread of inclusionary zoning to the rest of the country.

Insider Policy Recommendations

The theory behind inclusionary zoning is abundant, but actually designing, passing and successfully implementing an inclusionary ordinance can be challenging. It may be especially difficult contending with the intangibles of the process, such as collaborating with developers and garnering public support. Some lessons in navigating such policy can only be gained through experience, and it is with this in mind that renowned housing expert and former mayor of Albuquerque, David Rusk, offers his recommendations for anyone seeking to create inclusionary zoning. In his keynote address to the National Inclusionary Housing Conference of 2005, Rusk recommends enacting a mandatory inclusionary zoning law, claiming that voluntary programs “simply give spineless public officials political cover” (2005: 3). He also advocates fairness to developers, stating that they should not suffer an economic loss because of inclusionary zoning (4). In regard to getting an IZ ordinance passed, Rusk recommends stressing the importance of workforce housing needs, countering misinformation- particularly about its effects on housing prices, and forming broad-based coalitions to provide the necessary political will for effective implementation. And once an ordinance is adopted, Rusk recommends using public subsidies to

achieve deeper affordability, as is done in Montgomery County, since “even with all the cost-offsets, most builders cannot bring production costs below what families as 50-60% AMI can afford” (4).

This is one perspective on how to further inclusionary zoning, but others may take a less progressive tack. Rusk’s recommendations are also short on specifics as to what positions to take in negotiations with developers. To satisfy this need the Non-Profit Housing Association of Northern California (NPH) and the Home Builders Association of Northern California (HBANC) prepared a joint policy statement on how best to create inclusionary housing. Although these two organizations differed on the merits of inclusionary zoning, these were a number of positions on which they agreed. In regard to alternatives to on-site construction, it was agreed that housing developers should have the option of paying in-lieu fees, dedicating land, constructing units off-site, or using credit transfers. More specifically, any developers with projects of less than 50 units should be able to pay in-lieu fees without demonstrating their necessity; any dedicated land or off-site construction should accommodate more affordable units or for lower-income households than the original planned development and should be in the same jurisdiction; and two developers should be able to satisfy their inclusionary requirements through a mutual project, and any additional affordable units should be eligible for use as credits either for future inclusionary requirements or for other developers to purchase (NPH 2005: 3-6). It was also agreed that municipalities should make substantial contributions of their own with respect to incentives, cost offsets, and program administration. Municipalities were advised to provide housing assistance bonds, relieve developers of impact and processing fees, make density bonuses standard, and offer any surplus publicly-owned land to developers of affordable housing(6). Local governments were additionally advised to provide a dedicated staff to

administer the program “or contract with a competent entity to do so”, and to take responsibility for any unsold for-sale inclusionary units by either purchasing and marketing them or allowing them to be sold at the market rate and capturing the difference in sales prices to take responsibility for any unsold for-sale inclusionary units by either purchasing and marketing them as affordable units or allowing them to be sold at the market rate and capturing the difference in sales prices(7). This is a perspective which perhaps gives more leeway to developers than many inclusionary zoning advocates might be comfortable with. But addressing developer concerns encourages fairness and creates a better development atmosphere for all.

Douglas Porter reaffirms many of the policy recommendations above, and stresses a few points of his own. He emphasizes building community support for inclusionary zoning, both before and after its adoption. Porter suggests appealing to the positive economic effect of adequate workforce housing and tracking the experience of similar communities with inclusionary zoning (without simply copying from their ordinances) (2004a: 35). He also suggests experimenting with a planned inclusionary zoning program first by educating the public about its potential benefits, then negotiating agreements with developers of large or prominent projects, and finally transforming those voluntary arrangements into a mandatory program after years of trial and error (35). Porter also reiterates the importance of strong administrative support, supplementary housing programs, and State incentives or sanctions that promote inclusionary zoning (36).

Conclusions

The literature on inclusionary zoning is replete with recommendations and cautionary tales, often from people with direct experience with the policy. To this literature I can only hope to make a humble contribution of my own. Although there are many concerns with the implementation of inclusionary zoning which are commonly addressed, there are a few which I believe deserve greater attention, or which I expect to become larger issues in the years ahead. One concern I have is with the setting of in-lieu fees. In many ordinances it appears that these fees are calculated arbitrarily, or if there is a formula, it's not explicitly justified as to why the formula provides for optimal affordable housing creation. More than one commentator has identified in-lieu fees as a potential weak-link in many inclusionary zoning programs, so these fees should be determined carefully, as should all incentives and cost offsets. Another concerning issue is the inadequate coverage of certain development types in many IZ ordinances. One problem, as already mentioned, is the applicability of inclusionary requirements only to new developments and not rehabilitation projects, or only to developments which are below a certain height or density. These loopholes pertain especially to cites, and will therefore become increasingly relevant. A related problem is applying inclusionary requirements only to developments above a certain size threshold. Although this may be appropriate to many municipalities, as developable land becomes more scarce these requirements should be updated so as not to exclude a large portion of new developments. Finally, it should again be noted that in the wake of the housing market collapse, inclusionary zoning has not been rendered temporarily ineffectual, but rather holds unique potential to sustain housing developers.

Inclusionary zoning is not a panacea to the affordable housing crisis. A number of solutions will be required to make housing more economically integrated and accessible, and inclusionary zoning has its pros and cons just as every other affordable housing policy does. But

a well-implemented IZ program has the potential to do much good for a community, and local policymakers should be aware of this. A future to look forward to would be one where inclusionary zoning is commonplace, not just as a set of requirements to be imposed on others, but as a mutual commitment between the private market, governments and citizens to provide for the needs of all.

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Appendix: Inclusionary Zoning Ordinance of Boulder, Colorado

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CHAPTER 9-13: INCLUSIONARY ZONING

9-13-1: FINDINGS

- (a) A diverse housing stock is necessary in this community in order to serve people of all income levels. Based upon the review and consideration of recent housing studies, reports and analysis, it has become clear that the provisions of this chapter are necessary in order to preserve some diversity of housing opportunities for the city's residents and working people.
- (b) The program defined by this chapter is necessary to provide continuing housing opportunities for very low-, low- and moderate-income and working people. It is necessary to help maintain a diverse housing stock and to allow working people to have better access to jobs and upgrade their economic status. It is necessary in order to decrease social conflict by lessening the degree of separateness and inequality. The increasingly strong employment base in this region, combined with the special attractiveness of Boulder, its increasing University related population and its environmentally sensitive urban service boundaries, all combine to make the continued provision of decent housing options for very low-, low- and moderate-income and working people in Boulder a difficult but vital objective. The regional trend toward increasing housing prices will, without intervention, result in inadequate supplies of affordable housing here for very low-, low- and moderate-income and working people. This in turn will have a negative effect upon the ability of local employers to maintain an adequate local work force.
- (c) It is essential that appropriate housing options exist for University students, faculty and staff so that the housing needs of University related populations do not preclude non-University community members from finding affordable housing.
- (d) A housing shortage for persons of very low-, low- and moderate-income is detrimental to the public health, safety and welfare. The inability of such persons to reside within the city negatively affects the community's jobs/housing balance and has serious and detrimental transportation and environmental consequences.
- (e) Because remaining land appropriate for residential development within the city is limited, it is essential that a reasonable proportion of such land be developed into housing units affordable to very low-, low- and moderate-income residents and working people. This is particularly true because of the tendency, in the absence of intervention, for large expensive housing to be developed within the city which both reduces opportunities for more affordable housing and contributes to a general rise in prices for all of the housing in the community, thus exacerbating the scarcity of affordable housing within the city.
- (f) The primary objective of this chapter is to obtain on-site, privately owned, permanently affordable units. Some provisions of this chapter provide for alternatives to the production of such on-site units. Those provisions recognize the fact that individual site and economic factors can make on-site production less desirable than the alternatives for particular developers. However, the intent and preference of this chapter is that wherever possible, permanently affordable units constructed pursuant to these provisions be located on-site and be privately produced, owned and managed.

9-13-2: PURPOSE

The purposes of this Section are to:

- (a) Implement the housing goals of the Boulder Valley Comprehensive Plan;
- (b) Promote the construction of housing that is affordable to the community's workforce;

- (c) Retain opportunities for people that work in the city to also live in the city;
- (d) Maintain a balanced community that provides housing for people of all income levels; and
- (e) Insure that housing options continue to be available for very low-income, low-income, and moderate-income residents, for special needs populations and for a significant proportion of those who both work and wish to live in the city.

9-13-3: GENERAL INCLUSIONARY HOUSING REQUIREMENTS

(a) SCOPE OF CHAPTER

No person shall fail to conform to the provisions of this chapter for any new development which applies for a development approval or building permit for a dwelling unit after the effective date of this chapter. No building permit or certificate of occupancy shall be issued, nor any development approval granted, which does not meet the requirements of this chapter.

(b) PROHIBITIONS

No person shall sell, rent, purchase, or lease a permanently affordable unit created pursuant to this chapter except to income eligible households and in compliance with the provisions of this chapter.

ASSET LIMITATIONS FOR INCOME ELIGIBLE HOUSEHOLDS

- (c)** Income eligible tenants and purchasers of affordable units shall be subject to reasonable asset limitations set by the city manager. The city manager will establish maximum asset limitation requirements for tenants and purchasers of affordable units in order to accomplish the purposes of this chapter. The standard that the city manager will use to set the asset limitation is that the housing be available to people who, without assistance, would have difficulty marshaling the financial resources to obtain appropriate housing within the city.

PERMANENTLY AFFORDABLE OWNERSHIP UNITS

- (d)** Except as otherwise provided in this chapter, permanently affordable units that are required for developments that are intended for owner occupancy shall be provided as follows:

- (1) On-Site:** Permanently affordable units that are required to be constructed on-site shall be owner occupied in the same proportion as the dwelling units intended for sale as owner occupancy that are not permanently affordable within the development.
- (2) Off-Site:** Permanently affordable units that the developer may be allowed to provide off-site shall also be owner occupied in the same proportion as the dwelling units intended for sale as owner occupancy that are not permanently affordable within the development.

(e) TRANSITION TO INCLUSIONARY ZONING REQUIREMENTS

Developments of the type described in this Subsection shall be permitted to develop utilizing no more than one of the following provisions:

- (1) Developments Approved Prior to 1995:** Developments which received development plan approvals prior to October 5, 1995, shall conform to the provisions of this chapter or, in the alternative, may develop in compliance with the conditions of their previously issued development plan approvals so long as the construction of dwelling units are completed by December 31, 2001.
- (2) City Subsidized Developments:** Developments subject to agreements with the city executed prior to the effective date of this chapter in order to receive Community

Housing Assistance Program, HOME or Community Development Block Grant funds may either:

- (A) Develop in compliance with affordable housing and restricted housing agreements executed prior to the effective date of this chapter and provide restricted units as required pursuant to ordinances in effect at the time such developments were approved;
 - (B) Enter into a new agreement with the city manager to allow the development to retain funding pursuant to the earlier agreements, provide permanently affordable units as required pursuant to the earlier agreements and law, be relieved of all obligations to provide restricted units, and provide ten percent additional permanently affordable units as such units are defined by this chapter; or
 - (C) Refund all monies received pursuant to such agreements and agree that contracts providing for the provision of such funding shall be void. The development shall then develop in compliance with the provisions of this chapter.
- (3) **Development with Reservation Agreements:** Developments for which reservation agreements have been entered prior to the effective date of this chapter may develop in compliance with the affordable housing and restricted housing conditions contained in those agreements if building permits for the dwelling units are applied for by December 31, 2001.
- (4) **Developments Subject to Annexation Agreements:** Developments subject to affordable housing requirements imposed by annexation contracts entered into prior to the effective date of this chapter may develop in conformity with those contract provisions.
- (5) **Developments with Pending Project Approval Applications:** Developers of developments for which applications were filed prior to the effective date of this chapter may request that the city manager vary the standards of this chapter to allow for development in conformity with the approvals. The city manager will grant such variance requests by finding that the proposed variance will result in benefits to the city that are equivalent to the benefits that would otherwise have been created by the application of the provisions of this chapter.
- (6) **Moderate Income Housing Program:** Any development subject to Ordinance 4638, "Moderate Income Housing," as amended, and which has not entered into a separate agreement with the city manager to fulfill those requirements prior to the effective date of this chapter shall be relieved of its obligations under Ordinance 4638, as amended, and shall be subject to the requirements of this chapter.

(f) PERMANENTLY AFFORDABLE UNIT TYPES

The distribution of dwelling unit types that meet the permanently affordable unit requirements of this Section shall be as follows:

- (1) **Single Family:** In single family detached dwelling unit developments, the required on-site permanently affordable units shall also be single family detached units.
- (2) **Mixed Unit Type:** In developments with the included single-family detached units, attached units, multi-family apartment type units, or other dwelling unit types, the required on-site permanently affordable units shall be comprised of the different unit types in the same proportion as the dwelling units that are not permanently affordable within the development.

- (3) **Alternative Distribution Ratios:** The city manager is to approve different unit distributions among the permanently affordable unit types if doing so would accomplish additional benefits for the city consistent with the purposes of this chapter, or if approved pursuant to a site review pursuant to Section 9-2-14, "Site Review," B.R.C. 1981, results in a better design than not using the distribution of units provided for in this Section.
- (g) **REFERENCE INFORMATION**
 Whenever this chapter refers to information generated by HUD but no such information is generated by or available from that agency, the city manager shall generate appropriate information which can be utilized in the enforcement of the provisions of this chapter.

Ordinance No. 7212 (2002).

9-13-4: INCLUSIONARY OBLIGATION BASED UPON SIZE OF PROJECT

- (a) **DEVELOPMENTS OF FIVE OR MORE DWELLING UNITS**
 Any development containing five or more dwelling units is required to include at least 20 percent of the total number of dwelling units within the development as permanently affordable units.
- (b) **DEVELOPMENTS CONTAINING FOUR DWELLING UNITS OR LESS**
 Any development containing four dwelling units or less may comply with the obligations of this chapter either by including one permanently affordable unit within the project, by dedicating an off-site permanently affordable unit, by dedicating land that meets the requirements set forth in Section 9-13-6, "Off-Site Inclusionary Zoning Option," B.R.C. 1981, or by providing a cash-in-lieu financial contribution to the city's affordable housing fund established by Section 9-13-5, "Cash-in-Lieu Equivalent for a Single Permanently Affordable Unit," B.R.C. 1981.
- (c) **MINIMUM SIZES FOR PERMANENTLY AFFORDABLE UNITS**
 The minimum size for permanently affordable units shall be as follows:
- (1) The average floor area of the detached permanently affordable units in a development shall be a minimum of forty-eight percent of the average floor area of all the non-permanently affordable units which are part of the same development up to a maximum average size of 1,200 square feet of floor area.
 - (2) The average floor area of the attached permanently affordable units in a development shall be a minimum of eighty percent of the average floor area of all the non-permanently affordable units which are part of the same development up to a maximum average size of 1,200 square feet of floor area.
 - (3) The city manager will permit a decrease in size of the finished floor area, set forth in paragraph (1) above, if the dwelling unit is increased in size by 2 square feet of unfinished and potentially habitable space for each square foot of finished square foot of floor area that is decreased, up to a maximum of 400 unfinished square feet, upon finding that the unfinished space will be designed and configured in such a way as to allow for a simple conversion of the space at some future time. The factors that the city manager will consider to determine whether a simple conversion is possible include, without limitation, an adequate foundation, sound structural components, floor to ceiling heights, weather resistant roofs, appropriate exits, and window placement.
 - (4) The city manager is authorized to enter into agreements allowing permanently affordable units to constitute a smaller percentage of the total floor area contained within non-permanently affordable units at a given project if doing so would accomplish additional

benefits for the city consistent with the purposes of this chapter or to prevent an unlawful taking of property without just compensation in accordance with Section 9-13-10, "No Taking of Property Without Just Compensation," B.R.C. 1981.

9-13-5: CASH-IN-LIEU EQUIVALENT FOR A SINGLE PERMANENTLY AFFORDABLE UNIT.

(a) CASH-IN-LIEU EQUIVALENT

Whenever this chapter permits a cash-in-lieu contribution as an alternative to the provision of a single permanently affordable unit, the cash-in-lieu contribution shall be as follows:

- (1) **Detached Dwelling Units:** For each unrestricted detached dwelling unit, the cash-in-lieu contribution for the calendar year of 2000 shall be the lesser of \$13,200.00 or \$55.00 multiplied by 20 percent of the total floor area of the unrestricted unit. The cash-in-lieu contribution will be adjusted annually as set forth in Subsection (c) below.
- (2) **Attached Dwelling Units:** For each unrestricted attached dwelling unit, the cash-in-lieu contribution for the calendar year of 2000 shall be the lesser of \$12,000.00 or \$50.00 multiplied by 20 percent of the total floor area of the unrestricted unit. The cash-in-lieu contribution will be adjusted annually as set forth in Subsection (c) below.

(b) CONTRIBUTION-IN-LIEU PROVISIONS AFFECTING CERTAIN DEVELOPMENTS CONTAINING A SINGLE DWELLING UNIT

A lot owner that intends to construct a single dwelling unit that will be the primary residence of the owner for not less than one year immediately following the issuance of a certificate of occupancy shall meet the standards set forth in Section 9-13-4, "Inclusionary Obligation Based Upon Size of Project," B.R.C. 1981, or meet the following standards:

- (1) **Designation of Home as a Permanently Affordable Unit:** The owner shall make the unit a permanently affordable unit, except that such initial owner does not have to meet income or asset qualifications imposed by this chapter. The income and asset limitations shall apply to subsequent owners of the affordable unit.
- (2) **Alternative Method of Paying Cash-in-Lieu Contribution:** If the owner of a unit described in this Subsection chooses to comply with inclusionary zoning obligations imposed by this chapter by making an in-lieu contribution as set forth in Section 9-13-4, "Inclusionary Obligation Based Upon Size of Project," B.R.C. 1981, the owner shall have the option of deferring payment of that contribution until such time as the property is conveyed to a subsequent owner, subject to the following:
 - (A) The amount of the cash-in-lieu contribution shall be increased or decreased to reflect the percentage of change, if any, between the actual valuation determined by the Boulder County Assessor of the property upon which the unit is constructed following completion of such construction and the most recent actual valuation determined by the Boulder County Assessor of the same property at the time of transfer of title to a subsequent owner.
 - (B) The owner executes legal documents, the form and content of which are approved by the city manager, to secure the city's interest in receipt of the deferred cash-in-lieu contribution.
- (3) **Alternative Methods of Compliance:** If the owner of a unit described in this Subsection chooses to comply with the inclusionary zoning obligations imposed by this chapter by utilizing an in-lieu contribution approach, the city manager shall have discretion to accept

in-lieu consideration in any form so long as the value of that consideration is equivalent to or greater than the cash-in-lieu contribution required by this chapter and the city manager determines that the acceptance of an alternative form of consideration will result in additional benefits to the city consistent with the purposes of this chapter.

(4) Waiver of Inclusionary Zoning Obligation for Certain Size-Restricted

Developments: The owner of a lot who constructs a single dwelling unit upon that lot may elect to be exempted from the inclusionary zoning requirements imposed by this chapter if all of the following conditions are met:

- (A) Limitation on Eligible Lots:** The dwelling unit is a single detached dwelling unit built on a lot created prior to October 5, 1995;
- (B) Primary Residence of Lot Owner:** The dwelling unit is intended to be the primary residence of the owner and, following completion of the unit, the lot owner lives in the unit continuously for no less than one year immediately following the issuance of a certificate of occupancy;
- (C) Maximum Size:** The floor area of the single detached residential unit does not exceed 1,600 square feet;
- (D) Restriction on Size:** Restrictive covenants or other legal documents, the form and content of which are acceptable to the city manager, are executed to ensure that the single detached residential unit remains size restricted in perpetuity to a floor area not exceeding 1,600 square feet; and
- (E) One-Time Exemption:** No person shall be permitted to use the exemption set forth in this Subsection more than one time.

(c) ANNUAL ESCALATOR

The city manager is authorized to adjust the cash-in-lieu contribution on an annual basis to reflect changes in the median sale price for detached and attached housing, using information provided by Boulder County Assessor records for the City of Boulder.

(d) AFFORDABLE HOUSING FUND ESTABLISHED

The city manager shall establish an affordable housing fund for the receipt and management of permanently affordable unit cash-in-lieu financial contributions. Monies received into that fund shall be utilized solely for the construction, purchase, and maintenance of affordable housing and for the costs of administering programs consistent with the purposes of this chapter.

Ordinance No. 7212 (2002).

9-13-6: OFF-SITE INCLUSIONARY ZONING OPTION

(a) ON-SITE AND OFF-SITE INCLUSIONARY ZONING REQUIREMENTS

Except as otherwise provided in this chapter, in developments that require more than one permanently affordable ownership unit, the developer must construct a minimum of one-half of the required permanently affordable units on-site.

(b) VARIANCE TO ON-SITE CONSTRUCTION REQUIREMENT

The city manager is authorized to enter into agreements to allow a greater percentage of the required permanently affordable unit obligation to be satisfied off-site if the city manager finds:

- (i)** Securing such off-site units will accomplish additional benefits for the city consistent with the purposes of this chapter; or

- (2) If zoning, environmental, or other legal restrictions make a particular level of on-site compliance unfeasible.
- (c) **REQUIREMENTS FOR FULFILLING OBLIGATION OFF-SITE**
 To the extent that a developer is authorized to fulfill some portion of the permanently affordable housing obligation off-site, the developer may satisfy that obligation through any combination of the following alternate means:
- (1) **In-Lieu Contribution:** To the extent permitted by this chapter, developers may satisfy permanently affordable unit obligations by making contributions to the city's affordable housing fund in an amount that is calculated according to the standards set forth in Subsection 9-13-5(a), "Cash-in-Lieu Equivalent," B.R.C. 1981.
 - (2) **Land Dedication:** To the extent permitted by this chapter, permanently affordable unit obligations may be satisfied by dedication of land in-lieu of providing affordable housing on-site. Land dedicated to the city or its designee shall be located in the City of Boulder. The value of land to be dedicated in satisfaction of this alternative means of compliance shall be determined, at the cost of the developer, by an independent appraiser, who shall be selected from a list of certified appraisers provided by the city, or by such alternative means of valuation as to which a developer and the city may agree. The land dedication requirement may be satisfied by:
 - (A) **Land of Equivalent Value:** Conveying land to the city or its designee that is of equivalent value to the cash-in-lieu contribution that would be required under Section 9-13-5, "Cash-in-Lieu Equivalent for a Single Permanently Affordable Unit," B.R.C. 1981, plus an additional fifty percent, to cover costs associated with holding, developing, improving, or conveying such land; or
 - (B) **Land to Construct Equivalent Units:** Conveying land to the city or its designee that is of equivalent value (as of the date of the conveyance) to that land upon which required units would otherwise have been constructed (upon completion of construction). Land so deeded must be zoned such as to allow construction of at least that number of units for which the obligation of construction is being satisfied by the dedication of the land.
 - (C) **Dedication of Existing Units:** To the extent permitted by this chapter, permanently affordable unit obligations may be satisfied by restricting existing dwelling units which are approved by the city as suitable affordable housing dwelling units through covenants, contractual arrangements, or resale restrictions, the form and content of which are acceptable to the city manager. Off-site units shall be located within the City of Boulder. The restriction of such existing units must result in the creation of units that are of equivalent value, quality, and size of the permanently affordable units which would have been constructed on-site if this alternative had not been utilized. Where a proposed development consists of ownership units, units created under this Section shall be ownership units. The value of dwelling units created pursuant to this Section as a way of meeting the permanently affordable unit requirement shall be determined, at the expense of the developer, by an appraiser who shall be selected by the developer from a list of certified appraisers provided by the city or by such alternative means of valuation as to which a developer and the city may agree.

9-13-7: AFFORDABLE HOUSING REQUIREMENTS FOR RENTAL PROJECTS.

(a) **MANNER OF COMPLIANCE**

For developments containing rental units, permanently affordable unit obligations for such units shall be met in the following manner:

- (1) **On-Site or Off-Site Units Permitted:** All permanently affordable unit obligations of rental housing projects may be met through on-site units, off-site units, or by any combination of on-site and off-site units, which satisfy such permanently affordable unit obligation. Off-site units shall be equivalent in size and quality of on-site units that otherwise would be required by this chapter.
- (2) **Conversion of Rental Developments to Ownership Units:** A rental housing project that is not owned by the Housing Authority of the City of Boulder or its agents or in which the city does not have an interest through the Housing Authority of the City of Boulder or a similar agency consistent with Section 38-12-301, C.R.S., that chooses to fulfill its permanently affordable unit obligations off-site shall enter into a covenant or agreement with the city. The covenant or other agreement shall be in a form acceptable to the city manager and shall insure that the number of permanently affordable units that would have been provided if the project was an ownership development with off-site units used to meet the total inclusionary zoning requirements will be provided in the event that the proposed rental development converts to an ownership development within five years of the final unit in the development receiving a certificate of occupancy. Such covenant or agreement shall provide for the appropriate adjustment to the inclusionary zoning requirements of this chapter.
- (3) **Variance to Permanently Affordable Housing Requirement for Rental Projects:** The city manager may enter into agreements with the developers of rental housing projects such that permanently affordable unit obligations are satisfied in ways other than those listed in this chapter upon a finding by the city manager that such alternative means of compliance would result in additional benefits to the city which would further the objectives of this chapter.

(b) **DETERMINATION OF RENTAL RATES FOR PERMANENTLY AFFORDABLE UNITS**

If a developer of a rental housing project chooses to meet the permanently affordable unit requirements imposed by this chapter through the provision of on-site or off-site affordable rental housing, affordability of rental units shall be determined as follows:

- (1) **Maximum Rent:** Rents charged for permanently affordable units in any one project must, on average, be affordable to households earning ten percentage points less than the HUD low-income limit for the Boulder PMSA, with no unit renting at a rate which exceeds affordability to a household earning more than the HUD low-income limit for the Boulder PMSA.
- (2) **Maximum Income for Tenants:** No single household in a permanently affordable unit project shall have an income which exceeds the HUD low-income limit for the Boulder PMSA.

Ordinance No. 7212 (2002).

Chapter 9-13: Inclusionary Zoning
 Sec. 9-13-8: Affordable Housing Requirements For Ownership Units.
 (a) Maximum Sales Price for Permanently Affordable Units

9-13-8: AFFORDABLE HOUSING REQUIREMENTS FOR OWNERSHIP UNITS.

(a) MAXIMUM SALES PRICE FOR PERMANENTLY AFFORDABLE UNITS

The maximum sale price for an affordable ownership unit shall be set by the city on a quarterly basis.

(b) AVERAGE PRICE WITHIN A DEVELOPMENT

The prices charged for permanently affordable units in any one project shall average a price affordable to a household earning the HUD low-income limit, with no unit exceeding a price affordable to a household earning ten percentage points more than the HUD low-income limit for the Boulder PMSA.

(c) MAXIMUM INCOME FOR PURCHASERS OF OWNERSHIP UNITS

An ownership unit shall be sold to, or purchased by an income eligible household that meets the asset limitations established pursuant to this chapter.

(d) APPROVED PURCHASERS FOR PERMANENTLY AFFORDABLE UNITS

A developer or owner shall select a low-income purchaser after completing a good faith marketing and selection process approved by the city manager. Upon request, the city may provide the developer or owner of a permanently affordable unit with a list of households certified by the city as eligible to purchase the unit. However, a developer or property owner may select a low-income purchaser who is not on a furnished list so long as the city can verify the purchaser's income and asset eligibility and the unit is sold at an affordable price as described in this chapter.

(e) PURCHASERS OF PERMANENTLY AFFORDABLE UNITS REQUIRED TO RESIDE IN THOSE UNITS

A purchaser of a permanently affordable unit shall occupy the purchased unit as a primary residence, except subject to rental restrictions for permanently affordable ownership units.

(f) RENTAL RESTRICTIONS FOR PERMANENTLY AFFORDABLE OWNERSHIP UNITS

No person shall rent a permanently affordable ownership unit, except as follows:

- (1) Unit Initially Occupied:** The owner shall initially reside in the permanently affordable ownership unit for a period of not less than five years.
- (2) Notice:** The owner shall provide notice to the city prior to renting of the permanently affordable ownership unit of its intent to rent the unit.
- (3) Limitation on Lease Period:** The owner shall not rent or lease the entirety of the affordable unit for one or more periods aggregating not more than one year out of every seven-year period.
- (4) Lease Documentation:** Any lease or rental agreement for the lease or rental of a permanently affordable ownership unit pursuant to this Section shall be in writing.
- (5) Prior Approval:** Before the date upon which it becomes effective, a copy of any lease or rental agreement for a permanently affordable unit shall be provided to the city, along with those documents which the city finds to be reasonably necessary in order to determine compliance with this Section.
- (6) Scope:** The provisions of this Section shall apply to all rental or lease arrangements under which any person, other than the owner, his or her spouse, his or her domestic partner and dependent children or parents, occupies any part of the property for any

valuable consideration, whether that agreement is called a lease, rental agreement, or something else.

- (7) **Rental of a Bedroom Permitted:** At all other times, the only part of a permanently affordable unit which an owner may rent or lease is a bedroom, subject to all requirements of city ordinances concerning the renting of residential property.

(g) **RESALE RESTRICTIONS APPLICABLE TO PERMANENTLY AFFORDABLE UNITS**

All permanently affordable ownership units developed under this chapter shall be subject to the following resale restrictions:

- (1) **Approved Purchasers for Resale of Permanently Affordable Units:** A seller of a permanently affordable unit must select a low-income purchaser by a method that complies with the good faith marketing and selection process approved by the city manager. At the request of an applicant, the city will provide the seller with the description of a process that meets this requirement. Upon request, the city may provide a potential seller of a permanently affordable unit with a list of households certified by the city as eligible to purchase the unit. All purchasers of permanently affordable units shall be part of income eligible households.
- Resale Price for Permanently Affordable Units:** The resale price of any permanently affordable unit shall not exceed the purchase price paid by the owner of that unit with the following exceptions:
- (2) (A) Customary closing costs and costs of sale;
- (B) Costs of real estate commissions paid by the seller if a licensed real estate agent is employed and if that agent charges commissions at a rate customary in Boulder County;
- (C) Consideration of permanent capital improvements installed by the seller; and
- (D) The resale price may include an inflationary factor or shared appreciation factor as applied to the original sale price pursuant to rules as may be established by the city manager to provide for such consideration. In developing rules, the city manager shall consider the purposes of this chapter, common private, non-profit, and governmental lending practices, as well as any applicable rules or guidelines issued by federal or state agencies affecting the provision or management of affordable housing. In the event that the city has not adopted rules that contemplate a particular arrangement for the use of an inflationary factor or shared appreciation factor, the city manager is authorized to approve a resale price formula that is consistent with the purposes of this chapter, common private, non-profit, and governmental lending practices, as well as any applicable rules or guidelines issued by federal or state agencies affecting the provision or management of affordable housing.
- (3) **No Special Fees Permitted:** The seller of a permanently affordable unit shall not levy or charge any additional fees or any finder's fee nor demand any other monetary consideration other than provided in this chapter.
- (4) **Deed Restriction Required:** No person offering a permanently affordable unit for sale shall fail to lawfully reference in the Grant Deed conveying title of any such unit, and record with the county recorder, a covenant or Declaration of Restrictions in a form approved by the city. Such covenant or Declaration of Restrictions shall reference applicable contractual arrangements, restrictive covenants, and resale restrictions as are necessary to carry out the purposes of this chapter.

Ordinance No. 7212 (2002).

9-13-9: REQUIREMENTS APPLICABLE TO ALL REQUIRED PERMANENTLY AFFORDABLE UNITS

(a) CONSTRUCTION TIMING

The construction of required permanently affordable units in any development shall be timed such that they may be marketed concurrently with or prior to the market-rate units in that development. However, the city manager is authorized to enter into other phasing agreements if doing so would accomplish additional benefits for the city consistent with the purposes of this chapter.

(b) RESIDENTS ELIGIBLE FOR PERMANENTLY AFFORDABLE UNITS

No person shall sell, lease or rent a permanently affordable unit except to income eligible households.

(c) REQUIRED AGREEMENTS

Prior to approval of any development review pursuant to Sections 9-2-13, "Use Review," and 9-2-14, "Site Review," B.R.C. 1981, or a subdivision pursuant to Chapter 9-12, "Subdivisions," B.R.C. 1981, applicants for residential development projects shall have entered into permanently affordable housing agreements with the city. Such agreements shall specify the number, type, location, approximate size, and projected level of affordability of permanently affordable units. Prior to application for a building permit for a residential development project, developers shall execute such restrictive covenants and additional agreements, in a form acceptable to the city, as are necessary to carry out the purposes of this chapter. No development review application or subdivision application shall be approved in the absence of proof of the execution of required agreements and covenants. No building permit application shall be accepted in the absence of proof of the execution of required agreements and covenants.

(d) GOOD FAITH MARKETING REQUIRED

All sellers or owners of permanently affordable units shall engage in good faith marketing efforts each time a permanently affordable unit is rented or sold such that members of the public who are qualified to rent or purchase such units have a fair chance to become informed of the availability of such units. Every such seller or owner shall submit a public advertising plan targeting the appropriate income range for approval by the city manager.

9-13-10: NO TAKING OF PROPERTY WITHOUT JUST COMPENSATION

(a) PURPOSE

It is the intention of the city that the application of this chapter not result in an unlawful taking of private property without the payment of just compensation.

(b) REQUEST FOR REVIEW

Any applicant for the development of a housing project who feels that the application of this chapter would effect such an unlawful taking may apply to the city manager for an adjustment of the requirements imposed by this chapter.

(c) CITY MANAGER REVIEW

If the city manager determines that the application of the requirements of this chapter would result in an unlawful taking of private property without just compensation, the city manager may

alter, lessen or adjust permanently affordable unit requirements as applied to the particular project under consideration such that there is no unlawful uncompensated taking.

(d) ADMINISTRATIVE HEARING

If after reviewing such application, the city manager denies the relief sought by an applicant, the applicant may request an administrative hearing within which to seek relief from the provisions of this chapter. Any such hearing shall be conducted pursuant to the procedures prescribed by Chapter 1-3, "Quasi-Judicial Hearings," B.R.C. 1981. At such hearing, the burden of proof will be upon the applicant to establish that the fulfillment of the requirements of this chapter would affect an unconstitutional taking without just compensation pursuant to applicable law of the United States and the State of Colorado. If it is determined at such administrative hearing that the application of the requirements of this chapter would affect an illegal taking without just compensation, the city manager shall alter, lessen or adjust permanently affordable unit requirements as applied to the particular project under consideration such that no illegal uncompensated taking takes place.

9-13-11: ADMINISTRATIVE REGULATIONS

To the extent the city manager deems necessary, rules and regulations pertaining to this chapter will be developed, maintained and enforced in order to assure that the purposes of this chapter are accomplished.

9-13-12: MONITORING

Prior to July 1, 2002, the city manager will present sufficient information to the city council so that it can effectively review the operation of this chapter and determine whether any of the provisions of this chapter should be amended, adjusted or eliminated. Such information should be sufficient to allow the city council to evaluate the following:

- (a) The effectiveness of this chapter in contributing to the purposes of this chapter;
- (b) Any demographic trends affecting housing affordability indicate the need for amendments or alterations to the provisions of this chapter;
- (c) The level of integration of the provisions of this chapter with other tools being utilized by the city as part of a comprehensive approach toward obtaining the goals of this chapter.